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ASSOCIATE JUSTICE - SUPERIOR COURT
COMMONWEALTH OF MASSACHUSETTS
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CASES ARGUED AND DETERMINED
MASSACHUSETTS IN THE
= SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

DECEMBER 1914—APRIL 1915

HENRY WALTON SWIFT
REPORTER

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JUSTICES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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HON. WILLIAM CALEB LORING.

HON. HENRY KING BRALEY.

HON. HENRY NEWTON SHELDON.

(Resigned January 4, 1915.)

HON. CHARLES AMBROSE De COURCY.

HON. JOHN CRAWFORD CROSBY.

HON. EDWARD PETER PIERCE.

HON. JAMES BERNARD CARROLL.

(Appointed January 27, 1915.)

ATTORNEYS GENERAL

HON. THOMAS JEFFERSON BOYNTON.

HON. HENRY CONVERSE ATTWILL.

IN pursuance of the system adopted in 1874, beginning with 115 Mass., the cases are reported in the order of decision, and those decided on the same day are arranged according to the dates of argument or submission on briefs. The only exception to this rule is that, where an opinion is withdrawn temporarily by order of the court and is returned to the reporter too late to be printed in its regular place, it is inserted at the time of its return.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

EDGAR F. HANSCOM, trustee, *vs.* MALDEN AND MELROSE
GAS LIGHT COMPANY & others.

MALDEN AND MELROSE GAS LIGHT COMPANY
vs. FRANK E. CHANDLER.

Middlesex. November 30, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Statute, Construction. Attachment, Dissolution by death. Constitutional Law, Vested rights. Equity Pleading and Practice, Parties, Motion for final decree, Amendment, Answer.

It is irregular for a person whose rights are affected by a suit in equity to which he is not a party to file a "stipulation" agreeing to be bound by the decree to be entered in it. To be affected by the proceeding the person concerned should be made a party to the suit.

It is only statutes relating to remedies and not affecting substantive rights that commonly are treated as operating retroactively.

Collection by RUGG, C. J., of cases in which statutes have been held to apply only to causes of action subsequent to their taking effect.

St. 1913, c. 305, which amended R. L. c. 167, § 112, by providing that no attachment of property shall be dissolved by the death of the debtor "upon that part of the property which the debtor had alienated before his decease," which took effect upon its passage, does not apply to a case where, although the death of the debtor occurred after the passage of the statute, the attachment and conveyance both had been made before its passage.

It seems, that, if St. 1913, c. 305, which amended R. L. c. 167, § 112, by providing
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that no attachment of property shall be dissolved by the death of the debtor "upon that part of the property which the debtor had alienated before his decease," had contained a provision for its application to cases where the attachment and conveyance had been made before the statute took effect, such provision, if not the whole statute, would have been void as an attempt to transfer a vested property right from one person to another in violation of the Constitution of the Commonwealth and that of the United States.

If a plaintiff in a suit in equity, who has obtained a rescript in his favor, when moving for a final decree wishes, on account of events that have happened since the filing of his bill, to obtain relief beyond the scope of the bill, he must move for leave to amend the bill, and, if his motion is granted, the defendant has a right to demur or answer to the bill as amended, and the relief granted may be adapted to the facts and law existing at the time of the entry of the final decree.

No affirmative relief can be granted to a defendant in a suit in equity unless asked for in a cross bill.

Where in a suit in equity, after a rescript for the plaintiff, a motion for a final decree was filed, setting forth the death of the defendant since the filing of the bill and the appearance of the administrator of his estate, and asking for a final decree in accordance with the rescript ordering the payment of a sum of money and the issuing of an execution authorizing a levy upon certain real estate of the deceased defendant, which was attached on the original precept when the bill was filed and subsequently was conveyed by that defendant before his death, and the defendant administrator then filed what was termed "An answer to motion for final decree and execution," which was elaborate in form, the plaintiff's motion was treated as a motion to amend the bill and the answer was treated as an answer to the bill as amended, and the case was considered on that footing.

Rugg, C. J. The Malden and Melrose Gas Light Company made an attachment of the real estate of Frank E. Chandler in October, 1906, in a suit in equity (211 Mass. 226). On August 18, 1911, Chandler made conveyance of much of that real estate to Arthur W. Newell by a deed absolute in form (subject to the attachments) and at the same time they executed a memorandum of agreement setting forth the fact of the conveyance and stipulating that it was made as collateral security to protect the Fourth National Bank, now the Fourth Atlantic National Bank, for all loans then or thereafter made by the bank to Chandler, with power to sell and account for the proceeds, after satisfying all such indebtedness to the bank, to said Chandler or his heirs, executors or administrators. Chandler died on June 30, 1913, largely indebted to the bank. The plaintiff Hanscom has been appointed trustee in place of Mr. Newell, who has died. The rescript in the suit of the *Malden & Melrose Gas Light Co. v. Chandler*, affirming the decree of the Superior Court, was made

on February 29, 1912. No final decree has been entered, but the plaintiff in that suit is now pressing for a decree.

Hanscom, as trustee, brings this suit to restrain the Malden and Melrose Gas Light Company from undertaking to make levy on the real estate formerly of Chandler, to declare the attachment dissolved by the death of Chandler and for other relief. It is in substance a suit to remove the cloud on his title.

The Fourth Atlantic National Bank has filed a "stipulation" agreeing to be bound by the decree to be entered. This is irregular. A person should be made a party to a suit in equity if he is to be affected by the proceeding.

The principal question hinges on the effect of St. 1913, c. 305, which became operative on its passage on March 19, 1913. That was after the attachment and after the conveyance by Chandler to Newell, but before the death of Chandler. This act amended R. L. c. 167, § 112, by adding to the provision that attachments of real and personal estate of a debtor not theretofore levied upon are dissolved by his death (with an exception not here material) the limitation that "no attachment of property, real or personal, shall be so dissolved upon that part of the property which the debtor had alienated before his decease."

The first matter to be decided is whether the statute, according to its right interpretation, applies to the facts of the case at bar. The general rule of interpretation is that all statutes are prospective in their operation, unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of the subject matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations. Doubtless all legislation commonly looks to the future, not to the past, and has no retroactive effect unless such effect manifestly is required by unequivocal terms. It is only statutes regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights, that commonly are treated as operating retroactively, and as applying to pending actions or causes of action. *Mulvey v. Boston*, 197 Mass. 178. *Adams v. Adams*, 211 Mass. 198. *American Locomotive Co. v. Hamblen*, 217 Mass. 513.

The general rule that statutes are prospective only in their effect has been applied to statutes respecting suits on bonds for

breach of liberty in prison yards, *Call v. Hagger*, 8 Mass. 423; evidence of an advancement, *Whitman v. Hapgood*, 10 Mass. 437; limitations of actions against executors and administrators, *King v. Tirrell*, 2 Gray, 331; *Page v. Melvin*, 10 Gray, 208; confirmation of illegal railroad location, *Commonwealth v. Old Colony & Fall River Railroad*, 14 Gray, 93; extension of equity jurisdiction, *Buck v. Dowley*, 16 Gray, 555; remedies against estates of deceased persons, *Garfield v. Bemis*, 2 Allen, 445; recovery of illegal assessments, *Gerry v. Stoneham*, 1 Allen, 319; abolishing usury as a defense, *North Bridgewater Bank v. Copeland*, 7 Allen, 139, *Whitten v. Hayden*, 7 Allen, 407; complaints for support of bastard children, *Wheelwright v. Greer*, 10 Allen, 389; validation as a corporation seal of a mere impression upon paper, *Bates v. Boston & New York Central Railroad*, 10 Allen, 256; sales of intoxicating liquor, *Hotchkiss v. Finan*, 105 Mass. 86; settlements and support of paupers, *Somerset v. Dighton*, 12 Mass. 383, *Commonwealth v. Sudbury*, 106 Mass. 268, *Cambridge v. Boston*, 130 Mass. 357, *Abington v. Duxbury*, 105 Mass. 287, *Worcester v. Barre*, 138 Mass. 101; suits against married women as if they were single and exonerating husband from liability for judgment in such suits, *Hill v. Duncan*, 110 Mass. 238, 240, *Towle v. Towle*, 114 Mass. 167, *McCarty v. De Best*, 120 Mass. 89; special judgment where the defendant has given bond to dissolve attachment, and becomes bankrupt, *Fickett v. Durham*, 119 Mass. 159, *Barnstable Savings Bank v. Higgins*, 124 Mass. 115, *Mosher v. Murphy*, 121 Mass. 276; removal of defense in personal injury suits of traveling on the Lord's day, *Bucher v. Fitchburg Railroad*, 131 Mass. 156, *Read v. Boston & Albany Railroad*, 140 Mass. 199; the admission of dying declarations upon indictments for procuring miscarriage, *Commonwealth v. Homer*, 153 Mass. 343; restricting the number of places licensed for the sale of intoxicating liquors, *Commonwealth v. Hayes*, 149 Mass. 32; the curing of certain defects in notices required in claims for personal injuries, *Shallow v. Salem*, 136 Mass. 136, *Dalton v. Salem*, 139 Mass. 91; the creation of an action of tort for death caused by negligence, *Kelley v. Boston & Maine Railroad*, 135 Mass. 448, *Holland v. Lynn & Boston Railroad*, 144 Mass. 425, *Gunn v. Cambridge Railroad*, 144 Mass. 430n; bonds to be given to probate courts, *Conant v. Newton*, 126 Mass. 105; statements to be filed for mechanics' liens, *Pierce*

v. *Cabot*, 159 Mass. 202; revocation of will by marriage, *Swan v. Sayles*, 165 Mass. 177, *Ingersoll v. Hopkins*, 170 Mass. 401; divorces, *Burt v. Burt*, 168 Mass. 204, 207; damages accruing from fire set by locomotive, *Wild v. Boston & Maine Railroad*, 171 Mass. 245; violation of building ordinances, *Commonwealth v. Roberts*, 155 Mass. 281; restrictions of time within which suit may be brought for assessment against policy holders of a mutual insurance company, *Sanford v. Hampden Paint & Chemical Co.* 179 Mass. 10; approval by public boards, *Haverhill v. Marlborough*, 187 Mass. 150; deduction for good behavior in State prison sentences, *Murphy v. Commonwealth*, 172 Mass. 264, 277; changing effect of notice as foundations for action at law, *McNamara v. Boston & Maine Railroad*, 216 Mass. 506. The statutes considered in all the foregoing cases have been held to apply only to causes arising subsequent to their taking effect. The same rule prevails generally elsewhere. *Reynolds v. McArthur*, 2 Pet. 417, 434. *Murray v. Gibson*, 15 How. 421. *Chew Heong v. United States*, 112 U. S. 536, 559. *Cook v. United States*, 138 U. S. 157, 181. *Herrick v. Boquillas Land & Cattle Co.* 200 U. S. 96. *Union Pacific Railroad v. Laramie*, 231 U. S. 190, 199. *Cameron v. United States*, 231 U. S. 710, 720. *Dash v. Van Kleeck*, 7 Johns. 477, 502. *Lambard, Appellant*, 88 Maine, 587. *Gardner v. Lucas*, 3 App. Cas. 582, 597. *The Queen v. Ipswich Union*, 2 Q. B. D. 269. *Moon v. Durden*, 2 Exch. 22. *Knight v. Lee*, [1893] 1 Q. B. 41.

It is impossible to distinguish St. 1913, c. 305, as to its effect upon pending or past matters from those under consideration in these numerous cases.

Another and more decisive reason leads to the same conclusion. If the statute were construed to govern such a case as that here presented, it would be unconstitutional. The conveyance of the real estate to Mr. Newell vested in him all the right, title and interest of the owner, subject only to the attachment. It was a conveyance upon a valid and sufficient consideration. It was one which the grantor had a right to make and one which did not involve any fraud or prohibited preference. The grantee was a purchaser for value. The contract manifested by the conveyance and the property rights thereby transferred were entitled to all the securities conferred by the Constitution. When this conveyance was made, the law respecting the title was that the attach-

ment would be a lien superior to the conveyance provided the suit on which it was made should go to judgment and execution issue and be levied on the land during the life of the debtor. The law was equally clear that if the land was not so seized or taken, the attachment would be dissolved by the death of the debtor and the title free and clear of all lien arising from the attachment would vest in the grantee. The right to hold the real estate subject to that kind of an attachment in all its essential legal attributes was one of the incidents of the estate acquired by Mr. Newell. It was one of the elements which entered into the composition of the title which he took. Any increase in the legal burden imposed by these attachments affected adversely the quality of the estate conveyed. If it be assumed that the statute applies to the attachment in the case at bar, this would be the situation: Viewed in its practical aspect, the grantee of the debtor would now find himself possessed of an estate subject to an incumbrance different in a material degree from that which he bought. His reasonable expectation, based on the law at the time of his purchase, that his estate on the death of the debtor would be freed from all attachments, would turn into disappointment in finding that this attachment by reason of the subsequently enacted statute continued in full force, notwithstanding the death of the debtor. The converse is found as to the rights of the attaching creditor. Its lien acquired by the attachment, as the law stood at the time it was made, would vanish immediately upon the death of the debtor, if that event should occur before the land was seized or levy made upon execution. Now, with the aid of the statute, it would hold a lien, which had survived that event and become of great value, whereas the thing acquired at the time the attachment was made and preserved with its original infirmity up to the time of the conveyance to Mr. Newell would have shrivelled into something of small if of any value. The right of Hanscom here to be affected is not a mere possibility, resting wholly in expectancy. Its ripening into unincumbered possession was contingent only upon seizure or the levy of an execution before the death of Chandler. It is no more intangible than many interests arising under wills and trusts which have been held to be vested. *Clarke v. Fay*, 205 Mass. 228, and cases there collected. In substance and effect the statute, if held to

apply to the case at bar, has taken away from the grantee of the debtor valuable property rights without compensation and has handed them over to the attaching creditor without price.

This would not be a mere change in practice or modification of remedy. It would transfer a vested property right from one person to another by the pure fiat of the Legislature. This is contrary to the guarantees of both the State and Federal Constitutions. It would be a taking of property without due process of law. The law as to the enforcement and effect of a contract at the time it is made cannot be changed to the detriment of either party. Such law enters into the terms of the contract and becomes a part of its obligation. *Louisiana v. Pillsbury*, 105 U. S. 278. *Seibert v. Lewis*, 122 U. S. 284. *Denny v. Bennett*, 128 U. S. 489, 494. *Brine v. Insurance Co.* 96 U. S. 627, 637. The force and effect of a deed cannot be changed by act of the Legislature to the harm of the grantee after its delivery without his consent.

Numerous decisions in principle cover this aspect of the case at bar. The time for redeeming from a tax sale, *Solis v. Williams*, 205 Mass. 350, 355; or from a sale on execution, *State v. Sears*, 29 Ore. 580; or from a mortgage foreclosure, *Bronson v. Kinzie*, 1 How. 311, *Barnitz v. Beverly*, 163 U. S. 118, cannot be lengthened as to current sales or mortgages. The Homestead exemption cannot be increased, *Gunn v. Barry*, 15 Wall. 610, *Edwards v. Kearzey*, 96 U. S. 595, nor the exemption from a mortgage foreclosure enlarged, *Reed v. Swan*, 133 Mo. 100, nor the dower right amplified, *Parkham v. Vandeventer*, 82 Ind. 544, to the detriment of outstanding mortgage interests.

Although it has been held in some jurisdictions to be within the power of the Legislature to extinguish a wife's right of dower before it has become consummate, yet, whether such decisions are consistent with the law of this Commonwealth by which an inchoate right of dower is recognized as a property right, is open to grave doubt. *Dunn v. Sargent*, 101 Mass. 336, 340.

The decisions relied on by the defendant are distinguishable. Statutes as to the laws of descent may be changed. Wills and settlements as to heirs speak as of the death of the testator or settlor, unless another time is definitely fixed by the written instrument. Hence heirs can have no vested rights until the death of the ancestor, when his heirs are determined. *Sewall v. Roberts*,

115 Mass. 262, 277. The law of taxation may be changed at any time. In the absence of some binding contract no one has a vested interest in the continuance of such laws. *Cahen v. Brewster*, 203 U. S. 543. Statutes validating contracts or mortgages void in their inception have been upheld in cases where no vested property interests have intervened, on the ground that they effectuate the intent of the parties and prevent one from refusing to pay for what he has received. *Wildes v. Vanvoorhis*, 15 Gray, 139. *Satterlee v. Matthewson*, 2 Pet. 380, 411. *McFaddin v. Evans-Snyder-Buel Co.* 185 U. S. 505. *New Orleans v. Clark*, 95 U. S. 644. These stand on the general ground that they are in the interests of good morals and, as has been said, that there is "no such thing as a vested right to do wrong." *Foster v. Essex Bank*, 16 Mass. 245, 273. Statutes changing the period of limitations of actions have been upheld as applying to pending cases because they relate only to practice and procedure. Some of these, however, which have gone to the extent of permitting an action to be brought after it had been barred by the existing law as to limitations, *Danforth v. Groton Water Co.* 178 Mass. 472, *Dunbar v. Boston & Providence Railroad*, 181 Mass. 383, have been said to rest on "somewhat swampy ground." *Woodward v. Central Vermont Railway*, 180 Mass. 599, 603. A statute abolishing joint tenancies was upheld as to a deed previously executed, because it substituted another tenure more beneficial to all the tenants, *Holbrook v. Finney*, 4 Mass. 566. All these decisions may stand on the broad ground that they create a new remedy "for the protection of a prior right or for the redress of formerly existing grievances." *Selectmen of Amesbury v. Citizen's Electric Street Railway*, 199 Mass. 394, 395. The result is that the attachment of the Melrose and Malden Gas Light Company was dissolved by the death of Chandler and is now of no force or effect, and that company should be enjoined from attempting to enforce it.

Decree should be entered accordingly.

So ordered.

The case of MALDEN & MELROSE GAS LIGHT COMPANY v. CHANDLER comes before us on a reservation of the plaintiff's motion for a final decree after rescript. This motion sets forth in substance the death of the defendant and the appearance of

his administrators and asks for a final decree, in accordance with the rescript from this court, ordering the payment of the sum remaining unpaid after deducting certain partial payments and for an execution in form authorizing a levy upon such real estate of the deceased as was attached on the original precept and subsequently conveyed by the defendant during his life to Mr. Newell, all in reliance upon St. 1913, c. 305.

The defendant's administrators have filed what is termed an "Answer . . . to Motion for Final Decree and Execution." This is elaborate in form. It traverses the legal force of the facts and the applicability of St. 1913, c. 305, set forth in the plaintiff's motion, and asks certain affirmative relief.

This was irregular. Our practice makes no such full provision for motions for final decree as exists in England by statute. See 1 Dan. Ch. Pract. (6th. Am. ed.) 819 to 827. Perhaps all questions now presented could have been raised simply by setting down the case for hearing on the final decree. It was the plaintiff's duty as the prevailing party to prepare such final decree. The decree must conform to the frame of the bill. The matters set out in the plaintiff's motion would have formed appropriate matter for a bill of revivor or supplemental bill or both under original chancery practice. The requisite allegations to this end under our practice may be made by way of amendment to the original bill. Equity Rule 25. If the plaintiff thought that it was necessary for this purpose to set out further matters on the record, the proper form would have been to ask leave to amend the substance and prayers of the bill in order to extend the additional facts and a prayer for the special relief which it desired. To this amendment the defendants might have filed a demurrer or an amended answer. But in any event they could ask for affirmative relief only in a cross bill. There is no reason why the relief should not be adapted to the facts and law existing at the time of the entry of the final decree. *Bauer v. International Waste Co.* 201 Mass. 197, 203. *McMurtrie v. Guiler*, 183 Mass. 451. *Day v. Mills*, 213 Mass. 585. *Strout v. United Shoe Machinery Co.* 215 Mass. 116.

The plaintiff's motion is treated as a motion to amend its bill and the defendant's answer as an answer to that amendment, and the case is considered on that footing.

It follows from what has been said in deciding the suit of *Hanscom v. Malden & Melrose Gas Light Company*, that the plaintiff in this case is not entitled to levy the execution for debt, which may issue in its favor, on the real estate formerly of Chandler and now held by Hanscom. There is no occasion to determine whether, if it were so entitled, any change should be made in the ancient form of execution. An execution for costs should issue against the administrator of the estate of Chandler personally, and the decree should be changed to that extent. *Look v. Luce*, 136 Mass. 249. *Tyler v. Brigham*, 143 Mass. 410. R. L. c. 172, §§ 6, 7.

The final decree heretofore entered is to be modified by inserting the correct sum now due to the plaintiff after deducting payments already made, and by providing that execution in common form as against the property of the deceased is to issue, and another execution for costs alone against the administrator personally; and as so modified the decree is affirmed.

So ordered.

G. R. Blinn, (*F. K. Rice* with him,) for Hanscom.

G. B. Hayward, (*G. L. Mayberry* with him,) for Chandler.

R. P. Clapp, for the Malden and Melrose Gas Light Company.

JULIUS ANDREWS vs. HENRY C. SIBLEY & others.

Suffolk. November 30, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Bills and Notes, Material alteration. *Equity Jurisdiction*, Unjust enrichment.
Contract, Implied: common counts.

In a suit in equity against an individual defendant and an insurance company seeking to recover the amount of a certain promissory note which was made by the individual defendant payable to the defendant insurance company, and, after a forged alteration of the payee's name by a fraudulent agent of the insurance company, was sold by such agent to the plaintiff, under R. L. c. 73, § 141, there can be no recovery on the note against the individual defendant because the alteration was a material one, and there can be no recovery on the altered note "according to its original tenor," because such a restoration would make it payable to the insurance company, and in the present case that company could not be compelled to enforce the note as trustee for the plaintiff, because it appeared that the original note never was delivered to that company and that the fraudulent agent had no authority to receive the note in its behalf.

In a suit in equity seeking to recover the amount of a certain promissory note which the defendant made payable to an insurance company, intending to pay certain premiums on policies held by him, and which, after a forged alteration of the payee's name by a fraudulent agent of the insurance company, had been sold by such agent to the plaintiff either for cash or for notes of the agent, it appeared that, some weeks after the sale of the altered note to the plaintiff, the fraudulent agent, who wished to obtain possession of the defendant's policies, in rendering an account to the insurance company charged himself with the receipt of the money for the premiums which the defendant thought he had paid with the note and sent a check to the company for the balance shown by the account to be due from him, but it did not appear what this balance was or whether it amounted to as much as the premiums and it was not shown that any money which was paid by the plaintiff for the note, if he paid any money at all for it and did not merely surrender certain notes of the fraudulent agent, was used by the fraudulent agent to pay the defendant's premiums to the insurance company. *Held*, that the plaintiff had failed to prove that money wrongfully obtained from him had been used to pay debts of the defendant and so could ask for no relief on that ground.

BILL IN EQUITY, filed, as substituted, in the Superior Court on November 5, 1913, to recover the amount of a certain promissory note made by the defendant Sibley for \$1,159.20 with interest thereon at the rate of five per cent per annum from September 7, 1912, which note was purchased for value and in good faith by the plaintiff from one Williams after it had been altered fraudulently by him, with a prayer in the alternative that the note might be reformed and restored to its original condition and that the defendant Sibley might be ordered to pay the amount of the note to the defendant Connecticut Mutual Life Insurance Company as trustee for the plaintiff, and that the defendant insurance company might be ordered upon receiving the amount of the note to pay it to the plaintiff, and with prayers for other and further relief.

In the Superior Court the case was submitted to *Jenney, J.*, upon the following agreed statement of facts:

On and before September 8, 1912, the defendant Sibley was the owner of two life insurance policies issued to him upon his life by the defendant insurance company. These policies were in the form known as fifteen payment life policies, that is to say, Sibley was required by the terms of the policies to pay annual premiums thereon in fifteen successive years provided he should live so long but no premium thereafter, and the policies were payable at his death. Each policy was for the sum of \$10,000 and the annual

premiums on both were payable on September 8 in each year. The first annual premiums on the policies were paid by Sibley on September 8, 1899, and the succeeding annual premiums falling due on September 8 of each year up to and including the year 1911 also were paid by Sibley. The amount of the annual premiums payable on both policies on September 8, 1912, after deducting certain dividends to which Sibley was entitled under the provisions of the policies, was \$1,159.20.

Shortly before September 8, 1912, the defendant Sibley, wishing to arrange a premium loan for the premiums falling due on that date, that is to say, to give the defendant insurance company his note for the amount of the premiums instead of paying them in cash, called upon George E. Williams, who was then the general agent in Boston of the insurance company, and stated his wishes in this respect. Williams represented to Sibley that he could arrange the loan with the company and Sibley authorized him to do so. Thereafter, in accordance with instructions received from Williams, the defendant Sibley signed as maker a promissory note for \$1,159.20 dated September 7, 1912, and payable with interest at the rate of five per cent per annum one year from date to the order of the defendant insurance company, and likewise signed an assignment to the insurance company of his interest in the insurance policies as collateral security for the note. This note and assignment together with the insurance policies then were delivered by the defendant Sibley to Williams on or shortly before September 7, 1912.

Williams was the duly accredited general agent of the company in the city of Boston, and when a premium became due from an insured in Boston or vicinity, a so called premium receipt or acknowledgment of the payment of the premium was sent in advance to Williams and was delivered by him to the insured upon payment of the premium, and Williams accounted to the company for such payments. During 1912 the company was accustomed to lend money to its policy holders not exceeding the value of their respective policies upon the security of the policies, taking from the policy holder in each case a signed application for the loan and an instrument not in form or substance a promissory note, acknowledging the receipt of the loan and assigning to the company the policy as security therefor. These documents

always were prepared by the officers of the company at its home office and the preparation of them never was entrusted to any agents of the company. The authority of the general agent was limited to transmitting to the policy holder the documents so prepared at the home office for his signature, sending them when executed to the home office and transmitting to the policy holder the proceeds of the loan in the form of a draft payable jointly to all parties interested in the policy. Williams had no authority to receive the note of Sibley in behalf of the company, but Sibley believed the representations of Williams that he did have such authority and delivered the note to Williams for the sole purpose of delivery by him to the company. When Sibley delivered the note to Williams, Williams delivered to him the premium receipt for the premiums due September 8, 1912, on the policies.

Williams never delivered the note to the company and never informed the company that the note had been given to him by Sibley. On the other hand, he retained the note in his possession until it was disposed of by him as stated below, and on October 20, 1912, he reported to the company that on October 9, 1912, Sibley had paid the premiums in cash. At the time of making this report Williams also rendered to the company an account in which he charged himself with certain sums collected by him for the company and with the amount of the Sibley premiums as though they had been paid to him in cash and credited himself with certain amounts due him for expenses and commissions and sent to the company a check for the balance due as shown by the account.

Williams never delivered to the company the insurance policies or the assignment thereof which Sibley delivered to him as above stated and never informed the company that he had received them from Sibley. The assignment remained in the possession of Williams until his death and thereafter remained in the possession of the administrators of his estate. The policies remained in the possession of Williams until he disposed of them as stated below.

At some time shortly after September 7, 1912, Williams, still having in his possession the note actually signed by Sibley to the order of the defendant insurance company, altered the note by eradicating with chemicals or otherwise erasing the name of the company as payee and inserting in place thereof his own name,

George E. Williams. After this alteration had taken place and at some time during the month of September, 1912, Williams negotiated the note by indorsement and delivery to the plaintiff and the plaintiff gave to Williams therefor full and valuable consideration either in cash or by surrendering other notes then held by the plaintiff and then due and payable by Williams. The acts of Williams in altering the note as above stated and negotiating it to the plaintiff were all done without the knowledge, consent or authority of the defendant Sibley or of the defendant insurance company. The plaintiff, however, when he took the note, had no notice that it had been altered as above stated but honestly believed that it had been signed by Sibley in the form in which it was when the plaintiff received it.

At the maturity of the altered note the defendant Sibley refused to pay it or the amount thereof to the plaintiff and never has paid the amount of the note or any part thereof to the plaintiff or to any other person.

Williams died on July 28, 1913.

Sibley paid in cash the annual premiums due September 8, 1913, on the Sibley policies and each became thereupon a fully paid policy. Each of the policies had during the thirty days following September 8, 1914, a cash surrender value of \$7,730.

The following paragraph was agreed upon if it was admissible against the objection of the defendant Sibley:

"When Williams negotiated the note to the plaintiff he told the plaintiff that Sibley was a policy holder of the defendant company and that Sibley gave him the note to raise money thereon in order to pay a premium then due."

The following facts might also be taken to have been proved by the defendant Sibley if they were admissible in evidence against the objection of the plaintiff: At some time after October 20, 1912, Williams, being in possession of the policies belonging to the defendant Sibley, forged Sibley's name to a promissory note purporting to be made by Sibley to the order of Williams for the amount of \$10,000 and likewise to a document purporting to be an assignment of the policies from Sibley to Williams as collateral security for such \$10,000 note and negotiated this forged note by indorsement and delivery to a person whose identity was not material and received from that person

therefor a substantial sum of money. At the same time Williams transferred and delivered to such person the policies and the forged assignment thereof. The facts stated in this paragraph were not considered material by the judge in ordering the decree as stated below.

The judge ordered that the bill be dismissed with costs so far as the defendant Sibley and the Connecticut Mutual Life Insurance Company were concerned. Later by order of the judge a final decree was entered that the bill be dismissed as to all the defendants, and that the defendant Sibley recover against the plaintiff \$19.48 as costs. The plaintiff appealed.

P. Rubenstein, for the plaintiff.

H. W. Brown, for the defendant Sibley.

DE COURCY, J. It appears from the agreed statement of facts that the promissory note which the defendant Sibley delivered to George E. Williams was payable to the defendant insurance company one year from date, and was for the amount of the premiums due September 8, 1912, on Sibley's insurance policies. Shortly afterwards Williams altered the note by erasing the name of the insurance company as payee and inserting his own in place thereof. After this alteration and during the month of September, he negotiated the note by indorsement and delivery to the plaintiff, who now seeks to recover the amount thereof.

1. The plaintiff cannot recover from Sibley on the note. It is conceded that the unauthorized change of the payee's name was a material alteration. The note was thereby avoided as against Sibley, by § 141 of the negotiable instruments act, R. L. c. 73. The last sentence of that section, allowing a holder in due course to enforce payment of an altered note "according to its original tenor," even if applicable, cannot avail the plaintiff, as such a restoration would make the note payable to the order of the defendant insurance company, which never has indorsed it. The suggestion that the plaintiff might recover in the insurance company's name, or that the company might be compelled to enforce it as trustee for the plaintiff, loses sight of the facts that the original note never was delivered to the company; that Williams had no authority to receive the note in its behalf, that all his dealings with the instrument were without its knowledge, con-

sent or authority; and that consequently the company itself could not recover upon the note even if it were reformed and restored to its original tenor.

The further contention that Sibley authorized Williams to borrow money with which to pay premiums on the insurance policies, and consequently is bound by the acts of Williams under the general doctrines of agency, finds no support in the agreed facts.

2. It is urged that Sibley should be compelled to pay the plaintiff in equity and good conscience. The plaintiff argues that Williams, if he were alive, could not recover the money, because he was an officious volunteer in paying the premiums. Assuming that to be true, it is equally true that the plaintiff himself never was requested by Sibley to confer any benefit upon him. *Foote v. Cotting*, 195 Mass. 55. Further, it does not appear as matter of fact that the plaintiff did confer a benefit upon Sibley, on which a quasi-contractual claim for money had and received might be based. So far as the agreed facts disclose, what the plaintiff gave for the altered Sibley note was not money but other notes of Williams, which were held by him and then were due and payable. And, even assuming that some cash was paid by the plaintiff, he does not show that it was used by Williams to pay Sibley's premiums to the insurance company. It was some weeks afterwards that Williams, in settling with the company his accounts for collections, expenses and commissions, charged himself with the receipt of these premiums, and sent a check for the balance due as shown by the account. What that balance was does not appear, nor whether it amounted to as much as these premiums. On the facts disclosed it is impossible to say that money of the plaintiff actually was used to pay the company for the premiums owed by Sibley. In short, he fails to prove that money wrongfully obtained from him has been used to pay the debts of the defendant Sibley, and the principle on which equitable relief was granted in cases like *Newell v. Hadley*, 206 Mass. 335, and *Bannatyne v. MacIver*, [1906] 1 K. B. 103, is not applicable. The difficulty here is more than a mere absence of technical proof. The scheme of Williams, disclosed later, to secure a much larger sum by assigning Sibley's policies and forging his name to a note, suggests that in order to retain possession

of the policies for a year Williams was compelled to pay these premiums, regardless of whether he obtained money from the plaintiff on the altered note.

It is urged finally that unless the plaintiff is allowed relief the result will be that he is without remedy, and that Sibley holds the money without any consideration moving from him. As to the former, he still has his remedy against the estate of Williams. Sibley never was liable on the note, notwithstanding the plaintiff's mistaken belief to the contrary. And no relation of cause and effect is shown between the plaintiff's loss and Sibley's gain.

The question is not now before us as to Sibley's liability to reimburse the Williams estate. Nor is it settled that some other creditor of Williams has not a real equity in his favor, based on the use of his money, wrongfully taken, to pay his premiums. The fraudulent transaction here disclosed is but one of many in which Williams was involved. See *Herman v. Connecticut Mutual Life Ins. Co.* 218 Mass. 181. In any event the plaintiff must stand upon his own rights and show affirmatively that he has an equitable right to be paid by Sibley; and this he has failed to establish.

Decree affirmed.

IRA B. BRIGHTMAN'S (dependent's) CASE.

Suffolk. December 1, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Workmen's Compensation Act. Proximate Cause.

Under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part III, § 7, as amended by St. 1912, c. 571, § 12, by which the arbitration committee is required to file with the Industrial Accident Board its decision in regard to an injury "together with a statement of the evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it," it is made the duty of the arbitration committee to report all the material evidence, and it therefore is to be assumed in the absence of any statement on the subject in the report that this duty has been performed; although in a report of a decision of the Industrial Accident Board such a statement would be necessary to show that all the material evidence before that board was reported.

Where, therefore, on an appeal by an insurer from a decision of the Industrial Accident Board, it appears that that board heard the case only on the report of the arbitration committee and heard no other evidence, this court will assume that all the evidence is reported, although no statement to that effect appears in the record, and it is open to the insurer to argue that the findings are not warranted upon the evidence reported.

It here was *said* by the court, that in the reporting of appeals from decisions of the Industrial Accident Board in future cases it would be desirable to have a clear statement as to whether that board heard the case only upon the report of the arbitration committee or whether in addition to that report evidence was received at the hearing before the board.

Where it appears that a cook employed upon a lighter, who was required to live on board a large part of the time, when the lighter was sinking in a harbor made several trips to and from the deck of the lighter in saving some of his clothes and a surveying instrument, and, as he had valvular disease of the heart, his exertion and the excitement incident to the loss of the vessel caused him to die on the pier of a dock shortly after he had reached it with his clothes and the instrument, it can be found by the Industrial Accident Board that the injury that caused his death arose out of and in the course of his employment within the meaning of the workmen's compensation act.

RUGG, C. J. On this appeal from a decree made under the provisions of the workmen's compensation act, it is contended by the dependent that the question, whether the findings are supported by the evidence, is not open.

By St. 1911, c. 751, Part III, § 7, as amended by St. 1912, c. 571, § 12, the arbitration committee is required to file with the Industrial Accident Board its decision, "together with a statement of the evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it." No party is entitled to a second hearing as matter of right before the Industrial Accident Board upon any question of fact. Section 10 of Part III.

It seems from the record and the course of the argument in this court that no evidence was received by the Industrial Accident Board, but that its hearing was confined in this respect to the matters reported by the arbitration committee. The finding and decision of the Industrial Accident Board is not explicit in this respect. It would be desirable to have the fact stated definitely in order that occasion for doubt may be removed in future cases. But we feel warranted in making that assumption in the case at bar for the reasons stated. In any event it is an assumption in favor of the appealing party. It must be assumed that the arbitration committee performed its duty and reported

all the material evidence. The procedure in this respect differs from that on exceptions from the Superior Court, where, if the sufficiency of the evidence to support the verdict or finding is raised, it must appear that the material evidence is set forth. And the procedure also differs from that on findings and decision of the Industrial Accident Board. *Stickley's Case*, 219 Mass. 513. The positive duty resting on the arbitration committee to report all material evidence supplies the absence of the express statement required in a bill of exceptions. It follows that it is open to the insurer to argue that the findings are not supported by the evidence reported.

The deceased employee was a cook upon a lighter, where his employment required him to live and to be a large part of the time. The craft began to sink and he then made several trips to and from the deck in an attempt to save some of his clothes and a surveying instrument. With these he hastened to the pier of a dock, where he died soon after. He had suffered from valvular disease of the heart, and his exertions in the effort to save his belongings and the excitement incident to the loss of the vessel so aggravated the heart weakness as to cause his death. The perils of the sea were risks arising out of and in the course of the employment of the deceased. The sinking of the boat obviously was one of these perils. It is impossible to say as matter of law that it is not one of the instincts of humanity to try to save from a sinking vessel all of one's possessions that reasonably can be secured. The deceased perhaps exerted himself too much for this purpose, although it would be difficult on the evidence to determine to how great an extent the fatal result was due to that cause rather than to the excitement of the occasion. Under these circumstances the calm and wisdom of quiet and safety cannot be expected. Much must be excused to the surrounding commotion.

The deceased did not abandon the service of his employer and embark on a venture of his own when he tried to save his clothing. It was an implied term of such service as this that the employee might use reasonable effort to this end in an exigency like that which arose. This is not an instance where the discipline of a ship was violated or a higher duty neglected. It was in the course of his employment to live upon the lighter. What-

ever it was reasonable for any one to do leaving a sinking vessel which was his temporary home was within the scope of his employment. The standard to be applied is not that which now, in the light of all that has happened, is seen to have been directly within the line of labor helpful to the master, but that which the ordinary man required to act in such an emergency might do while actuated with a purpose to do his duty. The cases relied upon by the insurer, collected in 25 Harv. Law Rev. 420, 421, are distinguishable. They all are instances of conduct by the employee quite outside the scope of the employment resting upon intelligent abandonment for the moment of duty to the employer. In the case at bar there may be found to be apparent to the rational mind a causal connection between the employment and the thing done by the employee at the time of the sinking of the lighter. *McNicol's Case*, 215 Mass. 497.

Acceleration of previously existing heart disease to a mortal end sooner than otherwise it would have come is an injury within the meaning of the workmen's compensation act. *Wiemert v. Boston Elevated Railway*, 216 Mass. 598. *Clover, Clayton & Co. Ltd. v. Hughes*, [1910] A. C. 242. The finding of the Industrial Accident Board that the death of the employee arose out of and in the course of his employment was warranted by the evidence.

Decree affirmed.

J. T. Swift, for the insurer.

J. H. Kenyon, Jr., for the dependent widow.

ANTONIO ALBIANI & another *vs.* EVENING TRAVELER COMPANY
& others.

Suffolk. December 1, 2, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Agency, Ratification. Landlord and Tenant. Equity Jurisdiction, Laches, Damages. Evidence, Relevancy.

Where an agent of the general lessee of a building, on whom broad powers are conferred by reason of the trust reposed in his fitness and fidelity, exceeds his authority by executing in behalf of the general lessee a lease in writing of a

shop in the building containing a covenant for renewal, it is the duty of the general lessee, if he wishes to disavow the lease and covenant, to do so as soon as he has knowledge of them, and if, instead of such disavowal, he permits the sublessee to occupy the shop and allows the agent to collect the monthly rent for it in checks made payable to the general lessee, it can be found that he ratified the act of the agent in executing the lease with the covenant for renewal.

Where a corporation publishing a newspaper, which is the general lessee of a building, has in its employ a person who is called the assistant treasurer of the company, although no such office is recognized by the by-laws, and performs the duties that would be performed by an assistant treasurer if there were one, and who among such duties orally sublets portions of the building not needed for the newspaper business and collects the rents, having also authority to draw checks in the company's name, and who afterwards becomes a director of the company, if during the performance of these duties he exceeds his authority by executing in the name of the company a lease in writing containing a covenant for renewal, under which he collects monthly rent in checks made payable to the order of the company, these facts will support a finding that the company had such knowledge as a corporation can have of the existence of the lease and the covenant.

If the general lessee of a building gives to a subtenant a lease of a shop in the building containing a covenant for renewal at the same rent as that fixed by the lease for three years beyond the term of the general lessee's own lease, and thereafter the general lessee takes a new lease of the whole building for a term of three years beyond the end of the term of his former lease at an advanced rent, this does not relieve the general lessee from the obligation of his covenant for renewal in the lease of the shop.

The lessee of a barber's shop under a sublease containing the ordinary covenants from a corporation publishing a newspaper, which is the general lessee of the whole building, commits no breach of his lease by permitting a tailor and a bootblack temporarily to occupy an unimportant part of the shop, this not being a subletting but at most a revokable license to do something subsidiary or ancillary to the main purpose for which the shop is occupied by the lessee.

In a suit in equity in which there was a decree for the plaintiff and in which the facts supported an inference that there had been no laches, it was *said*, that, as the defence of laches was not set up in the answer, it could not have been relied on as a matter of right.

Where in a suit in equity it was plain on the evidence that a certain lease had been surrendered by the lessee and that its surrender was accepted by the lessor, a contention, that this constituted in effect an entry for breach of condition because there had been breaches of the terms of the lease which might have warranted an entry for breach of condition, cannot prevail against the finding of a master to the contrary, by whose report it appeared, among other circumstances, that a large sum of money was paid to the lessee when he surrendered the lease.

Where the owner of a building accepts a surrender of a lease of the whole building from the general lessee, and there is outstanding a sublease of a shop in the building containing a covenant for renewal made by the general lessee and good against him, the owner, in accepting the surrender of the lease of the whole building, takes it subject to the covenant in the sublease of the shop, and the sublessee in a suit in equity against such owner can enforce the specific

performance of such covenant for renewal or can recover its equivalent in damages.

In a suit in equity, in determining the equivalent in money of the plaintiff's right to a renewal of a lease of a barber's shop in which he carried on a thriving and increasing business, the plaintiff's testimony may furnish some basis for determining the profits of his business, although no books of account were kept.

In a suit in equity, in determining the equivalent in money of the plaintiff's right to a renewal of a lease of a barber's shop in which he carried on a thriving and increasing business, where the plaintiff by oral testimony has furnished a basis for determining the profits of his business, although no books of account were kept, it is proper for the presiding judge to exclude evidence offered by the defendant as to the custom of keeping books by other persons in the same business, this having no tendency to contradict the plaintiff and no necessary probative force respecting any material issue, and it is proper also for the judge to exclude evidence offered by the defendant as to accommodations in other parts of the building in rooms substantially unlike the plaintiff's shop in location and in opportunity for attracting customers after a necessary interruption of business.

BILL IN EQUITY, filed in the Superior Court on December 9, 1912, by the lessees of a barber's shop in the so called Traveler Building numbered 78 on Summer Street in Boston against the Evening Traveler Company, a corporation, the Boston Herald, Incorporated, a corporation, the successor and assignee of the Evening Traveler Company, and Francis R. Bangs, trustee, praying for an injunction against all the defendants to restrain them from interfering with the plaintiffs' possession of the premises and for the specific performance by the defendant Evening Traveler Company of a covenant for a renewal of the plaintiffs' lease for a period of three years from January 1, 1912.

The defendant Francis R. Bangs, trustee, filed a plea in abatement, setting up the non-joinder as defendant of his co-trustee Robert H. Gardiner; and an interlocutory decree was made that the bill be dismissed without costs as to the defendant Bangs.

The other defendants demurred and answered. On March 3, 1913, the plaintiffs were allowed to amend their bill by adding certain allegations and making Bangs and Gardiner defendants, they, as trustees, being the owners of the building and the lessors of the Evening Traveler Company.

On March 10, 1913, an interlocutory decree was made, with the consent of the plaintiffs, ordering that the bill should be dismissed as to the defendants the Evening Traveler Company and the Boston Herald Company, Incorporated, and that the case as

against the defendants Bangs and Gardiner be referred to Robert D. Weston, Esquire, as master, and enjoining the defendants Bangs and Gardiner until further order of the court from interfering with the plaintiffs' possession of the shop occupied by them in the building 78 Summer Street in Boston.

The defendants Bangs and Gardiner filed a cross bill asking for relief against the plaintiffs. The original plaintiffs demurred to the cross bill and their demurrer was sustained. The defendants Bangs and Gardiner appealed from the order sustaining the demurrer.

The master filed a report and afterwards a supplementary report, finding, among other facts, those that are stated in the opinion. The defendants Bangs and Gardiner filed exceptions to the master's report and supplementary report and also moved to recommit the report. An interlocutory decree was made by *Jenney, J.*, denying the motion to recommit, overruling all the exceptions of the defendants Bangs and Gardiner and ordering that the master's report be confirmed. Later by order of the same judge a final decree was entered ordering that the defendants Bangs and Gardiner, as trustees, pay to the plaintiffs as the money equivalent of the plaintiffs' right of possession, as found by the master under a stipulation of the parties, the sum of \$4,554 with interest thereon to the date of payment together with \$65.46 as costs of suit. The defendants Bangs and Gardiner appealed from the interlocutory decree denying their motion to recommit the report of the master, overruling those defendants' exceptions to the report and confirming the report, and from the final decree.

H. Williams, Jr., (*T. Brennan & L. C. Bigelow* with him,) for the defendants Bangs and Gardiner.

J. E. Hannigan, for the plaintiffs.

Rugg, C. J. The Boston Traveler Company was the lessee of a building on Summer Street in Boston for a term of ten years ending on January 1, 1912. In August, 1910, the Evening Traveler Company took over all the property of the Boston Traveler Company, including the lease. On May 11, 1911, a new lease was given by the defendants Bangs and Gardiner, trustees, to the Evening Traveler Company for three years from January 1, 1912. On July 1, 1912, the newspaper published by the Evening Traveler Company was consolidated with the Bos-

ton Herald, and the Evening Traveler Company moved its personal effects to the Herald Building. On January 30, 1911, a sublease of a store in the leased premises to the plaintiffs for eleven months, beginning February 1, 1911, was executed in the name of the Evening Traveler Company, containing this clause, "Albiani Bros. are to have the privilege of renewing this lease for a term of three years more provided the Evening Traveler Co. renews their lease that length of time."

The first question is whether this lease bound the Evening Traveler Company. The facts as found by the master are that it was signed by one Weeks, who had no original authority to execute such a lease. The Evening Traveler Company can be bound only because of its knowledge and ratification of the acts of Weeks. He was in the employ of the Evening Traveler Company and was called the assistant treasurer of the company, although there was no such office recognized in the by-laws. He was the person who performed the duties which would have belonged to such an officer if there had been one. The subletting of portions of the building not needed for the newspaper business was attended to by Weeks, who also collected rents, although no written lease was made except to the plaintiffs. The predecessor of the plaintiffs held under a written lease, which Weeks undertook to terminate in behalf of the company. The plaintiffs at once entered into open occupancy of their store and fitted it up as a barber shop at considerable expense with the usual furnishings of such establishments and did a thriving and increasing business. They paid their rent monthly by checks to the order of the Evening Traveler Company. Weeks had authority to draw checks in that company's name. He subsequently became a director of the company. The rent of other subtenants with one exception was increased after the renewal of the company's lease, its rent also having been increased. But no attempt was made to increase the rent of the plaintiffs. The lease to the plaintiffs was found among the papers of the Evening Traveler Company at the time of its removal to the Herald Building.

These facts are sufficient to support the master's finding that the Evening Traveler Company had such knowledge as a corporation can have of the existence of the lease to the plaintiffs.

The authority of Weeks to do many acts indicating a high

degree of confidence on the part of the employer was unquestioned. Power to draw checks is an important indication of the employer's trust in an agent. The letting of the store to the plaintiffs apparently was in the interests of his employer. That act was at most an excess of authority and ratification may be presumed from slight circumstances. The duty to disaffirm at once on knowledge is imperative because the inference of authority flows easily from the trust reposed by the principal in the fitness and fidelity of the agent. *Harrod v. McDaniels*, 126 Mass. 413, 415. *Reid v. Miller*, 205 Mass. 80, 85. The finding of the master that the Evening Traveler Company ratified the act of Weeks in making and delivering to the plaintiffs the lease and agreement to renew is supported by the reported facts. *North Anson Lumber Co. v. Smith*, 209 Mass. 333. *Cumberland Glass Manuf. Co. v. Wheaton*, 208 Mass. 425.

This is a case where the agent was acting for the apparent benefit of his principal and not conducting a fraud on his own account. There is no presumption that his personal interests would prevent him from disclosing the facts to his principal and cases like *Innerarity v. Merchants' National Bank*, 139 Mass. 332, relied on by the defendants, are quite inapplicable.

The renewal of the lease of the Evening Traveler Company need not be for the same rent in order to enable the plaintiffs to demand renewal of their lease. The fact that the covenantor has taken a new lease at increased rent will not relieve him from the obligation to perform his own contract. In this respect the case at bar is indistinguishable from *Cunningham v. Pattee*, 99 Mass. 248.

There was no breach by the plaintiffs of their lease in permitting a tailor and a bootblack temporarily to occupy a trifling part of their premises. They parted with no control. There was no subletting, but at most a revocable license to do something subsidiary or ancillary to the main purpose for which the premises were occupied by the plaintiffs as lessees. *Lowell v. Strahan*, 145 Mass. 1.

The result is that the plaintiffs had a binding contract for the renewal of their lease, which they could have enforced against the Evening Traveler Company by a bill for specific performance. *Leominster Gas Light Co. v. Hillery*, 197 Mass. 267.

The defendants contend that the plaintiffs abandoned their right to a renewal of their lease. But on this point the master found in favor of the plaintiffs, and the facts warrant the finding. Weeks notified the plaintiffs in November, 1911, that the company's lease had been renewed for three years and they thereupon said that they wanted a new paper. They demanded a formal renewal of Weeks on several occasions, who assured them that it was unnecessary, although promising to give it if insisted upon. The oral demand was enough under the circumstances to preserve their rights, provided it was made upon a proper representative of the Evening Traveler Company. When the consolidation with the Herald took place, a demand in writing upon the company was sent by registered mail. Weeks was not then in the service of the company. From these facts the inference is warranted that no one representing the company reasonably would have supposed that the plaintiffs had abandoned their claim for a renewal.

Laches has not been set up in the answer and hence cannot be relied on as matter of right. *Kershishian v. Johnson*, 210 Mass. 135, 139. But the facts support the inference that there have been no laches.

The lease of the Evening Traveler Company was surrendered to the lessors. This is the fair import of the written instruments by which the relation between them and the Evening Traveler Company and Higgins, assignee of the lease, are set forth. The contention of the defendants that this constituted in effect an entry for breach of condition cannot be supported. At least, in view of the master's report it cannot be regarded as a necessary consequence of what was done. The payment of the large sum of money concurrently with the release of that company from the covenants of the lease, in the light of the written agreement which in terms is a surrender, in connection with all the other circumstances forbids that inference. While there were breaches of the terms of the lease by the Evening Traveler Company, which perhaps would have warranted an entry for breach of its conditions, there is no imperative implication that that course was pursued.

The plaintiffs, therefore, had a valid lease from the tenant of the defendants, with a clause giving them a right to a renewal

upon a condition which came into existence. They seasonably demanded a renewal according to the terms of their contract, which they have never received, but they have never abandoned nor waived their right, nor have they been guilty of laches in seeking its enforcement.

The remaining inquiry is whether the plaintiffs have any remedy against the defendants. The facts upon which this right may be predicated are these: The plaintiffs on December 9, 1912, filed their original bill in which they set forth their claim of a right to a renewal of their lease against the Evening Traveler Company, the Herald Company and the defendant Bangs. The latter filed a plea in abatement on the ground that his co-trustee, Gardiner, was not joined, and on January 20 the bill was dismissed as to Bangs. He had filed an answer in which he denied that he contemplated remodelling the building or conspiring with the Evening Traveler Company to dispossess the plaintiffs. On February 8, 1913, the Evening Traveler Company lease was surrendered and two days later the defendants as lessors notified the plaintiffs that they must vacate the premises. Thereafter the lessors were made parties defendant. All these circumstances show that, when the lessors accepted the surrender of the Evening Traveler Company lease, it was subject to the rights of the plaintiffs. The defendants acquired no greater rights respecting the plaintiffs by the surrender than the Evening Traveler Company had against them. *Jones v. Parker*, 163 Mass. 564. *Beal v. Boston Car Spring Co.* 125 Mass. 157, 160. *Ferguson v. Jackson*, 180 Mass. 557. It was the duty of the Evening Traveler Company to renew the lease of the plaintiffs. Higgins, who was the assignee of the lease to the Evening Traveler Company, knew of the lease to the plaintiffs and stands no better than the Evening Traveler Company. The defendants gain no advantage as to the plaintiffs through surrender from Higgins above what would have come to them from dealing directly with the Evening Traveler Company. Relief may be had against them. *Felch v. Hooper*, 119 Mass. 52, 57. *Dooley v. Merrill*, 216 Mass. 500.

No error is disclosed in the master's rulings or findings respecting damages. The testimony of the plaintiffs, although found to be somewhat exaggerated, nevertheless furnished some basis for determining the profits of their business, even though no books

of account were kept. The evidence did not differ in kind from that which juries often have to consider in the assessment of damages. *Maynard v. Royal Worcester Corset Co.* 200 Mass. 1. *C. W. Hunt Co. v. Boston Elevated Railway*, 199 Mass. 220.

The evidence offered as to the custom of keeping books by others in the same business did not contradict the plaintiffs. It had no necessary probative force respecting any material issue. Evidence as to accommodations in other parts of the remodelled building, in a store substantially unlike in location and opportunity for attracting customers after a necessary interruption of business, rightly was excluded. It is not necessary to deal in detail with the other exceptions to evidence. Many of them relate to matters which in part were within the discretion of the master. In any event, no error of substantial importance appears and none of the exceptions ought to be sustained. *Pigeon's Case*, 216 Mass. 51, 55. See St. 1913, c. 716, § 1.

Decree affirmed with costs.

CAROLINE ANDERSON vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. December 2, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Negligence, Street railway.

In an action by a woman against a corporation operating a street railway for personal injuries sustained when the plaintiff was a passenger in a car of the defendant, there was evidence that as the car was approaching a station in a subway but had not come to a full stop the plaintiff, who had risen from her seat and had taken two or three steps toward the forward end of the car without having hold of any strap, was thrown over sideways and her hand went through a window of the car and was injured. She testified that, as the car came to the curve at the station, "all of a sudden, the car gave an awful jerk; a violent jerk. That threw me right to this side. It was just as though the car was going to tip right over." *Held*, that the plaintiff's description of the jerk of the car and the effect which it had upon her was not sufficient evidence of the negligence of the motorman to require the submission of the case to the jury.

CROSBY, J. The plaintiff, who was a passenger on a car of the defendant, was injured at or near the Park Street subway station by her hand going through one of the windows of the car. She testified that as the conductor called the station "the car came to a stop, and that she had taken two or three steps toward the forward end of the car before the jerk came; that her right hand went through the second window from the front on the right hand side of the car opposite the seat there that runs lengthwise; that the car started up again after the jerk and ran some distance before it stopped finally." She also testified: "The conductor called out, 'Park Street, change cars,' etc. Everybody got up. I got up. The car, all of a sudden, the car gave an awful jerk; a violent jerk. That threw me right to this side. It was just as though the car was going to tip right over, and of course, why, if I hadn't taken hold with my hand, I would have gone with my head first." She further testified that she did not have hold of any strap because they were all "occupied."

At the close of the evidence the defendant requested the presiding judge to rule that on all the evidence the plaintiff could not recover, and that there was no sufficient affirmative evidence of negligence on the part of the defendant. The defendant excepted to the refusal of the judge to give these rulings, and also excepted to so much of the charge as was inconsistent with the rulings.

The judge submitted to the jury two special questions. The first was: "At — or immediately before — the plaintiff arose from her seat, had the car come to a full stop?" To this question the jury answered "No." While the plaintiff testified that the car had come to a stop before she arose from her seat, still, since the jury have found that it did not stop, we must assume the fact to be as found by the jury.

There is no evidence to show that the track was not in proper condition or that the car was defective. The only question is whether the motorman could have been found to be negligent "in his method of going round the curve." The plaintiff contends that her description of the jerk of the car and the effect which it had upon her was sufficient evidence to warrant the jury in finding that the motorman was negligent in the operation of the car as it passed around the curve in coming into the station. Three

other witnesses testified at the trial, but none of them described the movements of the car as extraordinary or unusual. The case therefore must stand or fall solely upon the plaintiff's testimony.

It is a matter of common learning that electric cars cannot be run without occasional jerks and jolts, and for injuries to passengers arising from the ordinary sway or lurch and jerk of a car there is no remedy because there is no evidence of negligence; and this is true no matter how vivid, vigorous and vehement the adjectives employed may be in describing the movement of the car. *Hamilton v. Boston & Northern Street Railway*, 193 Mass. 324, cited by the plaintiff, was a case where the plaintiff was injured by the sudden starting of a car before she had a reasonable opportunity to reach a place of safety within the car. She was accompanied by her little boy, and when she was in the act of placing him upon the seat, the car started with a jerk and she was hurt. It was held that it was the duty of the conductor to ascertain whether the plaintiff had boarded the car and had got in such a position as to make it safe to start. The facts in that case have no application to the case at bar. *Cutts v. Boston Elevated Railway*, 202 Mass. 450; *Black v. Boston Elevated Railway*, 206 Mass. 80; and *Lacour v. Springfield Street Railway*, 200 Mass. 34, were all cases where there was affirmative evidence of physical facts as to either the starting or stopping of the car from which negligence could have been inferred. In *Nolan v. Newton Street Railway*, 206 Mass. 384, there was evidence that the car did not start slowly, but that when it was standing still the whole power was abruptly and carelessly turned on in an attempt to start at the maximum speed causing it to start with a "jump," and the plaintiff was thrown down before reaching a seat. She testified that it appeared as if the car "was going to stand right up." It was held by this court that there was evidence of what appeared to take place as a physical fact, and tended to show indirectly that the motorman was negligent.

Rust v. Springfield Street Railway, 217 Mass. 116, also relied on by the plaintiff, cannot be regarded as an authority for the plaintiff in this case. In that case there was evidence to show that the plaintiff, while sitting upon the end seat of an open car, was thrown upon the running board and then out into the street a distance of nearly fifteen feet, by reason of a violent jerk of the

car. It was held that the jury could have found from these physical facts that the jerk which threw her off was much greater and more abrupt and violent than is usual, and was evidence of negligence of the motorman.

In the two cases last referred to there was evidence of certain physical facts which ordinarily do not occur when a car is carefully operated, and which warranted the conclusion that the injuries received by the plaintiffs were not due to the ordinary jerks and jolts or swaying incident to the ordinary operation of an electric car, but were the result of negligence on the part of the motorman.

We are of opinion that upon the evidence in the case at bar it could not be found that the motorman was negligent. Although the plaintiff testified that as the car came to the curve at the Park Street station it swayed and gave a "violent" or "awful" jerk, still these words do not add anything to the description, as has been held by this court in several cases. *Foley v. Boston & Maine Railroad*, 193 Mass. 332. *McGann v. Boston Elevated Railway*, 199 Mass. 446.

Under the circumstances, as disclosed by the evidence, we are of opinion that the descriptive expression of the plaintiff that the jerk was so violent that it seemed "as though the car was going to tip right over," is not enough to authorize a finding that the car was negligently operated. There are no physical facts from which such negligence can be inferred. That the plaintiff lost her balance and her hand went through the window is no stronger evidence of negligence in the operation of the car than if, in falling, she had placed it against any other part of the car. From the evidence it appears that she was standing in the aisle, without holding on to anything, when the car ran around the curve. There are no physical facts to show that the accident did not occur by an ordinary jerk or lurching of the car as it passed over the curve. The evidence does not prove affirmatively that the motorman was negligent. The plaintiff's testimony that she thought the car was going to tip over, without any other evidence to warrant the inference of negligence, is not sufficient to justify a finding that the car was improperly or negligently operated in running around the curve. Although the jerk was described as "violent" and "awful," it does not appear affirmatively to have

been due to any carelessness in the operation of the car. We already have pointed out that the fact that the plaintiff's hand went through the window is not a physical fact from which alone negligence in the management of the car can be inferred. The case is governed by *Griffin v. Springfield Street Railway*, 219 Mass. 55; *Flanagan v. Boston Elevated Railway*, 216 Mass. 337; *Craig v. Boston Elevated Railway*, 207 Mass. 548; *Hunt v. Boston Elevated Railway*, 201 Mass. 182; *McGann v. Boston Elevated Railway*, 199 Mass. 446; *Foley v. Boston & Maine Railroad*, 193 Mass. 332; *Weinschenk v. New York, New Haven, & Hartford Railroad*, 190 Mass. 250; *Byron v. Lynn & Boston Railroad*, 177 Mass. 303.

For the reasons already stated the case is distinguishable from *Rust v. Springfield Street Railway*, 217 Mass. 116, and *Nolan v. Newton Street Railway*, 206 Mass. 384. A majority of the court are of opinion that the exceptions must be sustained and judgment entered for the defendant under St. 1909, c. 236.

So ordered.

F. Ranney, (T. Allen, Jr., with him,) for the defendant.

H. P. Williams, for the plaintiff.

MICHAEL F. MEAGHER vs. JAMES W. KIMBALL, special
administrator, & others.

Suffolk. December 2, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Executor and Administrator. Trust. Savings Bank.

Although a special administrator appointed under R. L. c. 137, § 9, who is authorized by § 10 to "commence and maintain suits" for the purpose of collecting and preserving the property of the deceased, is not given express authority by that section to defend suits, and although § 15 of the same chapter provides that "a special administrator shall not be liable to action by a creditor of the deceased," yet, where a suit in equity is brought to establish the beneficial ownership of a plaintiff in certain savings bank deposits which stood in the name of the deceased as trustee at the time of his death, and the Probate Court by a decree has authorized a special administrator appointed by that court to

appear and defend the suit, the Superior Court in which the suit is brought, on finding that the deposits are the property of the plaintiff, has authority to enter a decree ordering the special administrator to deliver the savings bank books to the plaintiff and ordering the banks thereupon to pay to the plaintiff the amounts of the deposits.

CROSBY, J. This is a bill in equity to establish a trust in two savings bank deposits represented by books of deposit standing in the name of "Thomas Meagher, Trustee for Michael F. Meagher." The trustee having died testate, the defendant Kimball has been appointed special administrator of his estate. An appeal from the allowance of the will by the Probate Court is now pending.

A judge of the Superior Court made certain findings of fact and has reported the case to this court.

He finds that all the essential allegations of the bill are proved, and specifically finds "that there was in the case of each deposit a perfected trust, and that the plaintiff is entitled to have the manual possession of the savings bank books and also a decree ordering the payment of the deposits now standing to the credit of Thomas Meagher, Trustee, account, paid over to the plaintiff upon surrender of said books."

The sole question is whether the Superior Court has power to enter a decree in favor of the plaintiff against the savings banks and the special administrator in accordance with the findings.

The judge found that the defendant Kimball was authorized by a decree of the Probate Court to appear and defend this suit. The powers and duties of a special administrator are defined by statute. He "shall collect all the personal property of the deceased and shall preserve the same for the executor or administrator when appointed, and for that purpose may commence and maintain suits." R. L. c. 137, §§ 9, 10. For the purpose of collecting and preserving the property, a special administrator may commence and maintain suits without special authorization from the Probate Court. The defendants contend that this suit cannot be maintained as there is no statute authorizing a special administrator to defend suits.

The Superior Court having found that the special administrator was authorized by decree of the Probate Court to appear and defend this suit, we are of opinion that it can be maintained.

R. L. c. 137, § 15, provides that "a special administrator shall not be liable to an action by a creditor of the deceased." The plaintiff is in no sense a creditor, nor does he claim as legatee or distributee, but as *cestui que trust* of moneys to the immediate payment of which he is entitled. The deposits were funds held by the testator in trust for his son, the plaintiff, who is the beneficial owner. These deposits are no part of the assets of the estate, and consequently no title or interest therein is vested in the special administrator. While the legal title was in the trustee during his lifetime, upon his decease the plaintiff became entitled to the immediate possession of the books and the deposits which they represented. *Sargent v. Sargent*, 168 Mass. 420. *Attorney General v. Brigham*, 142 Mass. 248. *Gould v. Emerson*, 99 Mass. 154. See *O'Brien v. New England Trust Co.* 183 Mass. 186.

The purpose of this bill is to establish a trust in certain definite and specific property. We have no doubt as to the authority of the Superior Court to enter a decree against the defendants. It having been found that a valid trust exists in favor of the plaintiff and that he is entitled to the bank books and to the amounts of the deposits upon surrender of the books, a final decree is to be entered for the plaintiff in accordance with the terms of the report.

So ordered.

The case was submitted on briefs.

M. L. Jennings & W. T. A. Fitzgerald, for the plaintiff.

E. A. McLaughlin, for the defendant Kimball.

HOWARD E. SANGER vs. WILBERT D. FARNHAM, Jr., trustee, & others.

Middlesex. December 2, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Trust, Duties of trustee. Devise and Legacy. Words, "Practicable."

A testator by the residuary clause of his will divided the residue of his estate equally between his son and his grandson and directed that, "as soon as practicable after my decease and such division shall have been made my trustees

shall pay to my said son the sum of five thousand dollars in cash or its equivalent; the income of the remainder of his half shall be added to the principal as it accrues and at the expiration of five years from the date of said payment of five thousand dollars all the principal and accretions thereto shall be paid to my son and the trust as to him closed." The trustees were given power to sell but not to mortgage real estate. A part of the residue consisted of real estate appraised at \$9,000. There was not enough personal property in the hands of the executors to pay the son \$5,000 without a sale of real estate. The son agreed to take the real estate as a part of his half and the balance in personal property and agreed to a sale of the real estate. The trustees sold the real estate as soon as they could, which was within two years from the testator's death, and thereupon paid to the son the balance of the \$5,000 to be paid to him in cash. In a suit in equity by the son to fix the date in five years from which the trust for the plaintiff should be terminated and the remaining part of his half of the residue should be paid to him, it was *held*, that there had been no unnecessary delay, and that the payment to the plaintiff of the balance of the \$5,000 in cash had been made "as soon as, practicable" after the testator's decease, thus fixing the time from which the five years of continued existence of the trust were to run.

A power to sell real estate given to the trustees under a will for the purpose of making a division of the property of the testator does not include a power to mortgage the real estate.

BILL IN EQUITY, filed in the Probate Court for the county of Middlesex on June 13, 1913, praying for an order fixing the date five years after which the trust for the benefit of the plaintiff under the will of his father, Warren Sanger, must be terminated.

In the Probate Court the case was heard by *McIntire, J.* The material clause under the will of Warren Sanger is quoted in the opinion. The judge made a decree "that the time when it became practicable after the decease of the testator for the trustees to have paid over the sum of five thousand dollars in cash to said Howard E. Sanger as directed by said will was August 10th, 1909, and in five years from that date according to said will and intention of the testator, the remaining sum held in trust should be paid over to the said Howard and the trust as to him terminated."

Paul Allen Sanger, a grandchild of Warren Sanger, between whom and the plaintiff the residue of that testator's estate by the terms of his will was to be divided equally as stated in the opinion, appealed from the decree.

The appeal was heard by *Hammond, J.*, who made certain findings of fact, including the facts stated in the opinion, and reported

the case for determination by this court, concluding his report as follows:

"At the time of the division above mentioned there was in the possession of the trustees \$17,000 worth of personal property and this house appraised at \$9,000, in all, \$26,000. The plaintiff could have said, 'I insist upon having half of that personal property and I am willing to take half of the real estate and that is all I am willing to do.' The trustees I find were not inclined to make an agreement that way and the petitioner then said, 'Very well, I will take the \$9,000 worth of real estate; I want the money now and I will take \$9,000 in real estate, the house, and the balance in personal property.' The balance of the personal property was less than \$5,000. When the petitioner made that agreement, while there is nothing said in it, I think he agreed to the consequences of it, and one of the consequences was that the trustees did not have in their hands enough to pay this \$5,000, and he impliedly, by that agreement, agreed to wait until it was practicable to raise the balance of the \$5,000 out of that real estate. I do not think that the time at which the trustees were to pay the \$5,000 arrived until the last payment which they made to the plaintiff, to wit, Nov. 15, 1910. I find on this evidence that the trustees did not have the \$5,000 in cash or other personal property in their hands when they paid him \$3,000, and that they could not have paid it out of his share unless they had sold or mortgaged this real estate. I think the last payment, November 15, 1910, was as early as they could obtain the money with which to pay the balance of the \$5,000. They paid it as soon as the property was sold, and that is less than two years from the time when the testator died, and I find that the date when it became practicable to pay the \$5,000 was not earlier than November 15, 1910. With the consent of the parties I report the case for the consideration of the full court."

S. Bell, (*A. F. Ray* with him,) for the plaintiff.

G. A. A. Pevey, for the defendants.

BRALEY, J. By the residuary clause the testator divided his remaining estate into two equal parts for the benefit of his son and grandson and directed that, "As soon as practicable after my decease and such division shall have been made my trustees shall pay to my said son Howard the sum of five thousand dollars

in cash or its equivalent; the income of the remainder of his half shall be added to the principal as it accrues and at the expiration of five years from the date of said payment of five thousand dollars all the principal and accretions thereto shall be paid to my son Howard and the trust as to him closed." It is manifest that the earlier the division, the sooner the son and petitioner would receive the first payment, and the time from which the five years were to run when the remainder of the principal became payable would be accelerated. The question for decision is, When did it become practicable for the trustees to make distribution?

A part of the residue consisted of real property and before a division could be made under the scheme of the will and the trust fund created it would have to be converted. The trustees accordingly are authorized to sell and to invest the proceeds in such manner as they shall deem best. The trustees also were the executors, and until the settlement of the estate it could not be finally determined how much personal property would fall into the trust. The plaintiff, who appears to have been in necessitous circumstances, requested the trustees upon their appointment to make a division and pay to him the first \$5,000, and to raise the money by a mortgage on the real estate. It is to be inferred that this request was on the ground that the balance shown by the executor's first account was only a trifle more than half of the amount required.* The refusal of the trustees was justified.

The power of conversion being "out and out," they could sell but had no authority to mortgage. *Kent v. Morrison*, 153 Mass. 137, 139. It moreover was only when the estate had been closed, and the balance of the personal property had been transferred to themselves as trustees, that the residue and trust fund was capable of ascertainment. By the agreement which thereupon followed between the beneficiaries with the assent of the trustees, the plaintiff with full information as to the assets of the trust was to take as part of his share the real estate at a fixed valuation. If this had not been done no division until the realty had been turned into money could have been made. The plaintiff was not obliged to enter into the agreement. It was open to him to demand half of

* The balance in the hands of the executors, as shown by this account, was \$2,535.30.

the personal property with the acceptance of half of the real estate as his share. But not having done so, he must be presumed to have known that a sale must take place before the first payment would become due. The power to convert remained in the trustees for the purposes of the trust which would be only partially executed, and the single justice expressly found, that the plaintiff's share could not have been fully satisfied except by using a part of the proceeds of the sale.

The settlement was acted upon by all parties, yet it was not until something more than a year had elapsed that the trustees, with the consent in writing of the plaintiff, effected a sale and were for the first time enabled to carry out the provisions of the will. If, as the plaintiff now urges, there was unnecessary delay, it is chargeable to his own voluntary conduct and is not due to any delinquency of the trustees. The time of settlement under the finding appears to have been November 15, 1910, when the last payment immediately following the sale was made to the plaintiff. It was not until then under the circumstances, that they were able to obtain the money, and the execution of the trust became "practicable."

The decree of the Probate Court fixing August 10, 1909, as the date from which the limitation of five years is to be computed is to be modified by the substitution therefor of November 15, 1910, and when so modified it is affirmed.

Ordered accordingly.

JUSTINA M. A. DEFERRARI vs. JOSEPH R. DEFERRARI.

Suffolk. December 4, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Marriage and Divorce. Husband and Wife. Superior Court. Probate Court. Judgment. Child. Guardian.

R. L. c. 152, § 17, gives the Superior Court full jurisdiction, where after the hearing of a libel for divorce the conclusion is reached that a divorce should not be granted but that there ought to be a temporary separation of the parties or a maintenance of the wife separate and apart from the husband, to deal

with the case as the interests of the parties may require and to make orders for the separate maintenance of the wife and the custody and support of minor children, which while in force shall supersede any order or decree of the Probate Court under R. L. c. 153, § 33.

A decree of the Probate Court appointing a man and his wife joint guardians of their minor child is superseded, so far as it relates to the custody of the child, by a decree of the Superior Court, made in a divorce suit brought by the wife more than a year later, awarding to the wife the care and custody of such minor child and ordering the husband to make certain payments for the support of his wife and child.

Under R. L. c. 152, §§ 16, 17, 25-28, the Superior Court, when a man and his wife are before it as the parties to a libel for divorce, becomes the court of domestic relations in matters affecting the welfare of the family and the care, custody and support of minor children.

RUGG, C. J. This is a libel for divorce. It was heard at length by a judge of the Superior Court, who found that the evidence in behalf of the libellant failed to establish the allegations of her libel, and that the libellant had not been guilty of marital wrong toward her husband. But he did find "that the libellee's conduct toward and treatment of his wife has been such as to justify her in living apart from him and that she is now living apart from him for justifiable cause." Thereupon a decree was entered, which is printed in a footnote.* The libellee took exceptions to the rulings of the trial judge and appealed from this decree. After the entry of the decree the libellant filed a petition praying that the libellee be adjudged in contempt of court for failure to comply with the terms of the decree. The judge of the Superior Court before whom this petition was heard found that the libellee was in contempt and, continuing the case for judgment, reported

* "This case came on to be heard at this sitting and was argued by counsel; and thereupon upon consideration thereof it is ordered, adjudged and decreed that said libel be continued on the docket of said court and that the libellant have the care and custody of her minor child, Giovanni B. DeFerrari, from the first day of July to the twentieth day of September in each year and for a week at the Christmas holidays in each year and that the libellee have the care and custody of said minor child for the remainder of each year hereafter; that the libellee be hereby prohibited from imposing any restraint on the personal liberty of the libellant; that the libellee pay to said libellant for the support of herself and her said minor child the sum of two thousand dollars (\$2,000) forthwith and the further sum of ten dollars (\$10) each week hereafter, except that for those weeks in which the libellant shall have the care and custody of the said minor child the libellee shall pay her the sum of fifteen dollars (\$15) each week."

it, if he had authority to do so, to this court for determination of questions of law raised at the hearing before him.

It is not necessary to decide whether the exceptions taken at the trial were prematurely entered, *Weil v. Boston Elevated Railway*, 216 Mass. 545, nor whether an appeal lies at this stage from the decree, *Oliver Ditson Co. v. Testa*, 216 Mass. 123, nor whether a proceeding for contempt can be reported, *Newton Rubber Works v. de las Casas*, 198 Mass. 156, for, if it be assumed in favor of the libellee that all the substantive questions argued by him are before us properly, it does not appear that he has been prejudiced by any error of law.

The libellee contends that, when it had been found as a fact that neither the allegations of the libellant nor the counter charges of the libellee had been proved, the only decree which legally could have been entered was one dismissing the libel, and that the court had no jurisdiction to deal with the case in any other way. Whether this is sound or not depends on the meaning of R. L. c. 152, § 17.*

This section is comprehensive in its terms. It does not appear to be restricted in its operation to any particular stage of the proceedings. According to the strict interpretation of the phrase in which jurisdiction is conferred, it appears to be an alternative to the entry of a decree for divorce. The three preceding sections had conferred ample power during the pendency of the libel to require the payment of alimony, to protect the wife from the restraint of the husband and to make provision for the custody of the children. Section 17 would add little to the jurisdiction conferred by these three earlier sections if its scope was so narrow as the libellee contends. It deals broadly with the subject of separate maintenance. Its

* That section is as follows: "The court may, without entering a decree of divorce, cause the libel to be continued upon the docket from time to time, and during such continuance may make orders and decrees relative to a temporary separation of the parties, the separate maintenance of the wife and the custody and support of minor children. Such orders and decrees may be changed or annulled as the court may determine, and shall, while they are in force, supersede any order or decree of the probate court under the provisions of section thirty-three of chapter one hundred and fifty-three, and may suspend the right of said court to act under the provisions of said section."

purpose appears to be to provide exclusively for that matter so far as it goes. It excludes the Probate Court by reference to R. L. c. 153, § 33. Interpreting the section according to its natural meaning and in connection with its context, it confers upon the Superior Court full jurisdiction in cases where, after a hearing upon a libel, the conclusion is reached that the divorce ought not to be granted, but that there ought to be a temporary separation of the parties or a maintenance of the wife separate and apart from the husband, to deal with the case as the interests of the parties in the light of all the evidence may require. This procedure is in accordance with the requirements of prompt, adequate and efficient administration of justice. It would be unfortunate in such case for the Superior Court, after having heard the whole case, to find itself powerless to afford the remedy which the evidence requires simply because jurisdiction of that particular phase of domestic relations was vested in another tribunal. Such a conclusion ought not to be reached unless made imperative by the plain words or necessary implication of the statute. It is required by neither in this case. The question of separate maintenance is not the direct issue always involved in a libel for divorce. But commonly the hearing in a contest takes a broad range and at its end the magistrate usually is in a position to determine what course ought to be followed. The decree entered was within the jurisdiction of the Superior Court and warranted by the facts found.

The questions of law raised by the libellee upon the petition for contempt are decided adversely to his contentions in substance by what has been said. His chief reliance was on the invalidity of the decree. But that was within the jurisdiction of the Superior Court. He offered in evidence a decree of the Probate Court entered something more than a year before the libel was filed, whereby the father and mother were appointed joint guardians of their minor child, detailed provision was made for the months of the year when he should be with each parent and as to the amount to be paid by the father for his support while he was with his mother. In the nature of things a decree of such character for the custody of a minor child is subject to revision by a court of competent jurisdiction as the best interests of the child may demand. While the Superior Court has no jurisdiction

to appoint a guardian to have the care of the property of a minor, *Stone v. Duffy*, 219 Mass. 178, it is clothed by the statute with extensive powers to deal with the custody of minor children of whose parents it has acquired jurisdiction for purposes of divorce. The statutory provisions in this regard are ample. R. L. c. 152, §§ 16, 17, 25-28. The Superior Court becomes the court of domestic relations touching the welfare of the family when the father and mother are before it on a libel for divorce. So much of the decree of the Probate Court as related to the custody of the child had been superseded by the subsequent decree of the Superior Court covering that matter. Hence, it afforded no excuse for the libellee's failure to comply with the decree of the Superior Court.

Cause remanded to the Superior Court for judgment.

L. R. Chamberlin, for the libellant.

W. H. Irish, for the libellee.

C. H. BATCHELDER AND COMPANY, INCORPORATED, vs. CHARLES
H. BATCHELDER.

CHARLES H. BATCHELDER vs. C. H. BATCHELDER AND COMPANY,
INCORPORATED.

Suffolk. December 4, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Name. Good Will. *Sale,* Good will. *Corporation.* *Words,* "Person."

An awning maker formed a corporation, whose corporate name consisted of his own name with the word "Company" added, of which he held all the outstanding stock and to which he transferred his business including the good will. After carrying on business for a period the corporation passed into the hands of a receiver, who, after carrying on the business for a further period, sold the assets, including the "business, good will and trade names" of the corporation, to purchasers who organized a new corporation with the same name except that the word "and" was inserted before "Company" and the word "Incorporated" was placed after it. The original proprietor of the business then started again in the same business in his own name with a plain announcement that he was in no way connected with the corporation, and the corporation brought a suit in equity against him to enjoin him from carrying on the busi-

ness in his own name after they had purchased the good will of that business. He filed a cross bill under R. L. c. 72, § 5, to enjoin the corporation from using his name. By agreement of the parties this court could draw inferences of fact from the findings reported, and it was *found* as a fact that the awning maker, when he formed the first corporation and transferred to it the good will of his business, did not intend to transfer the right to use his name beyond the business life of the corporation then formed by him, and it was *held*, that the new corporation's purchase from the receiver of the good will of the first corporation gave it the right only to do business as the successor of the first corporation, and did not give it the right to use in its business the name of the individual awning maker, who, having refused to consent to its use, had the right under R. L. c. 72, § 5, to resume his business in his own name, if he refrained from unfair competition, and accordingly that the bill of the corporation should be dismissed, and that in the cross suit a decree should be entered granting the individual awning maker an injunction and referring the case to a master for the assessment of damages.

In the provision of R. L. c. 72, § 5, in regard to the use in business of the name of a person by "a person who carries on business in this Commonwealth," the word "person" in the phrase quoted includes a corporation, although § 5 is not named in the sections enumerated in § 1 of the same chapter in which the word "person" includes "corporation."

BRALEY, J. A corporation chartered as the C. H. Batchelder Company was organized by Charles H. Batchelder, hereafter referred to as the defendant, to take over and carry on the business conducted by him under the same name. Its capital stock was divided into preferred and common shares, although no part of the preferred stock ever was issued. The vote of the board of directors to take over the business and to assume all outstanding liabilities, followed by his acceptance and receipt of the entire common stock of the company in payment, operated as a transfer and sale of the personal property therein enumerated. The presiding judge having found upon evidence not reported that the vendor also intended as part of the consideration to include the good will, the corporation succeeded to a going commercial enterprise, with a recognized line of patronage, as if the transfer had been effected by a formal bill of sale. *Tufts v. Plymouth Gold Mining Co.* 14 Allen, 407. *Beacon Trust Co. v. Souther*, 183 Mass. 413.

In less than two years the corporation passed into the hands of a receiver, who under the decree carried on the business for nearly two and one half years more, when he sold the assets including the "business, good will and trade names of the C. H. Batchelder Company." The purchasers organized the plaintiff corporation

to which they transferred their purchase and since then it has carried on at the old stand business of the same general nature and character as that which formerly had been conducted by the defendant and the C. H. Batchelder Company.

After the receiver's sale, but not before, the defendant, having set up at his dwelling house a similar business of making, repairing and storing awnings, solicited the patronage of those who previously had traded with him or with the former company. As a result of the competition the plaintiff, by its bill, asks for injunctive relief, and for an accounting of profits, while in the second bill, which is really in the nature of a cross bill, the defendant seeks to have the plaintiff restrained from the further use of his name and for an accounting of profits or for damages.

The title acquired by the purchasers at the receiver's sale, which was confirmed by the court, and of the plaintiff who claims under them, is in effect the same as if the corporation had wound up its affairs and made the transfer. *Tobin v. Central Vermont Railway*, 185 Mass. 337. *Eastern Bridge & Structural Co. v. Worcester Auditorium Co.* 216 Mass. 426. *Duplex Printing Press Co. v. Clipper Publishing Co.* 213 Penn. St. 207. And the rights of the parties are commensurate with the scope of the defendant's contract with the company which he organized. A sale of the good will imposes upon the vendor an obligation to refrain from doing anything which deprives the buyer of the benefit and advantages of the purchase. *Foss v. Roby*, 195 Mass. 292. But if a competing business is set up by the vendor, whether an agreement not to compete, where none has been expressed, is to be implied, is a question of fact. *Old Corner Book Store v. Upham*, 194 Mass. 101, 105. The question is before us on the record, which states that this court by agreement of the parties may draw inferences of fact from the findings reported. The purpose of the defendant as the founder and organizer of the corporation, over whose affairs as its president and treasurer he exercised unrestricted control until the receivership, was plainly to enable him to do business in corporate form. The findings of the judge leave no doubt that he treated the business as being essentially the same as if it were his own. The corporation was his creature or instrumentality and in reality the business remained his personal business, which he transacted under the corporate name. *Montgomery*

v. *Forbes*, 148 Mass. 249, 253. *Ginn v. Almy*, 212 Mass. 486, 505, 506.

The possibility that the company might become insolvent, or the probability that his connection with it might be severed, or that it would go out of business, does not appear to have been contemplated by the contracting parties. It doubtless is true that if by any chance he had retired and the corporation went on, he could not have engaged in a similar business where the circumstances as to locality and the sources of trade showed that it would be in derogation of his grant. *Gordon v. Knott*, 199 Mass. 173, 178, and cases cited.

What the parties understood and intended, is to be ascertained as of the date of the contract. *Smith v. Vose & Sons Piano Co.* 194 Mass. 193. The assumption that he ever intended to compete with himself, or that either he or the directors in any way considered whether upon his retirement the business should be sold, is unwarranted. It is fairly to be inferred that the defendant's implied obligation was never understood or intended to go beyond the business life of the corporation, and the contract cannot be held as embracing an implied restriction which the parties never had in mind. *Hanson & Parker, Ltd. v. Wittenberg*, 205 Mass. 319, 327, 328. The cases of *Marshall Engine Co. v. New Marshall Engine Co.* 203 Mass. 410, and *Myott v. Greer*, 204 Mass. 389, to which the plaintiff refers as supporting its contention that the undertaking was unlimited in time and unrestricted as to persons or locality, are upon their facts plainly distinguishable. If instead of organizing a corporation the defendant had formed a partnership, it is settled, that when the partnership ended upon a winding up by a receiver each partner would have been at liberty to do any kind of business, and could solicit customers of the former firm even if its good will had been sold by the receiver as part of the partnership assets. *Hutchinson v. Nay*, 183 Mass. 355. *Moore v. Rawson*, 185 Mass. 264; 199 Mass. 493.

We are unable to perceive any distinction in principle. The corporation as a business concern ceased to exist, although until dissolved it is a technical legal entity. *United Zinc Co. v. Harwood*, 216 Mass. 474.

Its winding up with this exception does not differ from the winding up of a partnership by a receiver. In either event the

good will is an asset, which may be sold for the benefit of creditors, and the purchaser acquires the exclusive right to represent himself as the successor in trade of the firm or the corporation. *Moore v. Rawson*, 199 Mass. 493.

The plaintiff, without the assent of the defendant and against his written protest, has appropriated his name as the principal part of its corporate designation. By R. L. c. 72, § 5, "A person who carries on business in this Commonwealth shall not assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person, either alone or in connection with his own or with any other name or designation, without the consent in writing of such person or of his legal representatives." And under R. L. c. 8, § 5, cl. 16, the word "person," as used in our statutes, may be held to include a corporation. *Lawrence Manuf. Co. v. Lowell Hosiery Mills*, 129 Mass. 325. See St. 1903, c. 437, § 5.

The definitions referred to in R. L. c. 72, § 1, do not exclude the construction of the word "person" as meaning a corporation wherever it becomes necessary to give full effect to the purpose or spirit of the statute. It is settled that the purchaser of the good will of a partnership has no right, without their consent, to use the name of the former partners in such a way as to indicate that the business is being conducted by those who no longer are connected with it. *Moore v. Rawson*, 199 Mass. 493. The purchaser can represent himself as the successor of the old firm, but he cannot hold himself out as being the old firm. *Lothrop Publishing Co. v. Lothrop, Lee & Shepard Co.* 191 Mass. 353, 355.

No substantial difference appears under the statute between the successor by purchase of the good will of a partnership and of a corporation which has been organized and permanently gone out of business under the conditions disclosed in the present case.

It further is found, that except for the similarity of names the public have not been misled; but as the names and the business are similar some confusion has resulted whereby customers intending to trade with the defendant have purchased of the plaintiff under the impression that he was connected with the company. The use of the defendant's name, having been limited to the first corporation, it was not a transferable right or asset which the plaintiff could take over and use against his protest. *Lodge*

v. *Weld*, 139 Mass. 499. *Fairfield v. Lowry*, 207 Mass. 352. It having been distinctly found that the defendant never has represented his goods as having been made by the plaintiff and has informed customers and instructed his employees to inform them that he was not in any way connected with the plaintiff, and all correspondence received by him, directed to it, having been promptly transmitted to the company, he cannot be charged with unfair competition. *Reading Stove Works v. S. M. Howes Co.* 201 Mass. 437, 440. *Forster Manuf. Co. v. Cutter-Tower Co.* 211 Mass. 219. *C. A. Briggs Co. v. National Wafer Co.* 215 Mass. 100.

The right to use his own name in earning a livelihood should not be taken away, and being under no contractual obligation to the plaintiff to refrain from soliciting customers wherever he can find them, so long as he does not represent himself as being either the C. H. Batchelder Company or the plaintiff corporation, it has not made out a case for equitable relief. *Gilman v. Hunnewell*, 122 Mass. 139.

The result is that in the first case the bill is to be dismissed, while in the second case a decree is to be entered awarding an injunction as prayed for and referring the case to a master to assess such damages, if any, as the defendant has suffered since the date of protest, December 16, 1913. *Foss v. Roby*, 195 Mass. 292, 298. *Reading Stove Works v. S. M. Howes Co.* 201 Mass. 437, 441, 442. *Forster Manuf. Co. v. Cutter-Tower Co.* 211 Mass. 219, 223.

Ordered accordingly.

R. E. Tibbets, for C. H. Batchelder and Company, Incorporated.
H. L. Sampson, for Charles H. Batchelder.

WILLIAM ENDICOTT, Jr., & another, trustees, vs. PHILIP F. HAVILAND & another.

Norfolk. December 7, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Adverse Possession. Limitations, Statute of.

If one is put in possession of land under an oral agreement that when he has performed certain services he shall be given a deed of the land, and after having performed the services demands the deed, which at first is promised and later is refused, and if this person thereafter continues to occupy the land for more than twenty years, continuously asserting his right of possession and his right to receive a deed, his possession is adverse and he has established a title by limitation against the holder of the record title.

If one is in possession of land under an oral agreement for its conveyance to him upon the performance by him of certain services, which he has performed, and has demanded a deed which has been refused, so that his possession has become adverse to the holder of the record title, and if the holder of that title attempts to eject him, and he resists successfully and brings a suit in equity against such holder of the record title to enjoin the threatened eviction, asking also for the specific performance of the agreement to give him a deed, and this suit is dismissed, but he continues his possession under a claim of right, the bringing of the suit in which he has asserted his right of possession, does not interrupt the period of his adverse possession or stop the running of the statute of limitations.

WRIT OF ENTRY, to recover certain real estate in the town of Weymouth, dated August 15, 1911.

The tenants' answer set up a title acquired by adverse possession for more than twenty years.

In the Land Court the case was tried before *Davis, J.*, who found the following facts:

In 1872 the demanded premises were owned by Mrs. Ann Weston, for whom and whose family the tenants' mother, Mrs. Mary A. Haviland, had for many years worked as a seamstress. Mrs. Haviland had lived in a house owned by Mrs. Weston. In 1872 Miss Deborah Weston, one of the four daughters of Mrs. Ann Weston, asked Mrs. Haviland whether she would not like to own a house of her own, and proposed to talk the matter over with the rest of the Weston family. Later in the same year she proposed that a house should be built on the demanded

premises and that Mrs. Haviland should pay for it by ten years' work for the family, provided \$1,000 worth of work should be done. Mrs. Haviland assented to this proposal. Thereupon the house was built, and Mrs. Haviland moved into it in October, 1872, remaining until her death in 1910. Since that time the tenants have been in possession, claiming under her.

In 1878 Mrs. Weston died, leaving the premises by will to her four daughters. One of these, Miss Caroline Weston, died in the spring of 1882, leaving all of her property to her three sisters. Mrs. Haviland kept an account of her work for the Westons, and in 1882 she had done more than \$1,000 worth. She then went to Miss Deborah Weston and asked for a deed. Miss Deborah Weston replied that as soon as she returned from Europe (where her surviving sisters lived) she would have it done. She also told Mrs. Haviland that they all were willing to give a deed except her sister Emma. In 1883 the defendant John Haviland told his mother that she ought to have a writing, but she replied that the Westons were very honorable people and could be relied upon to carry out their promise. Miss Deborah Weston went abroad in 1887 and never returned, and the Weston affairs were placed in the hands of an agent. The family owned a considerable amount of real property, the demanded premises being a corner lot fenced off out of the part of the estate known as Watch House Hill. In 1887 the agent for the estate demanded rent from Mrs. Haviland, who refused to pay any, claiming to hold under her agreement for sale.

Miss Emma Weston died shortly before March 21, 1888, and her interest in the premises passed to her sisters Anne and Deborah. In May, 1888, a writ of ejectment was brought against Mrs. Haviland by the two sisters, through their agent and counsel. Mrs. Haviland appeared by attorney and defended the action; and in June, 1888, the case was continued generally on the docket and nothing further was done. In 1890 Miss Deborah Weston died, leaving all of her property to her sister Anne, and in 1892 Anne died, leaving the demandants as her devisees and trustees.

The demandants, after their appointment, sent to Mrs. Haviland their agent, who demanded the payment of rent, but she refused, told her story and claimed ownership. Thereupon, in June, 1893, the demandants executed a lease to one Bourk, who

as lessee gave Mrs. Haviland notice to quit. She immediately brought a bill in equity against both Bourk and the demandants, alleging her possession and an oral promise of a deed, and praying that they all be enjoined from disturbing her possession, and that the present demandants be ordered to convey the premises to her. The defendants, who were the present demandants, demurred, and without a hearing thereon, no injunction having issued, the bill, in 1896, was dismissed, and Mrs. Haviland appealed. In 1901 the appeal was dismissed.

The judge ruled that, even if the suit in equity did not in itself interrupt Mrs. Haviland's possession, it suspended the demandants' right and duty to interrupt it; that from 1872 to 1882 Mrs. Haviland was in possession under a license and the promise of a future deed; that the terms on which she was to receive the deed were not completed until October, 1882, and that thereafter, until 1887, Mrs. Haviland was in possession, not adversely and claiming to be the owner, but under an oral promise which she trusted to the honor of the Westons, whose ownership she recognized, to fulfil.

The judge, after stating that the sole issue was whether the tenants showed an adverse occupation for twenty years under such circumstances that the demandants and their predecessors were estopped by the facts or by the statute of limitations from asserting their record title, found that until 1887 there was nothing to show the owners that Mrs. Haviland was claiming adversely to them, and that from 1893 to 1901 she was endeavoring to enforce an oral agreement for a deed and asking that the demandants be restrained from disturbing her possession; that, even if it were assumed that the tenants could tack to their occupation since 1901, the period between 1887 and the bringing of the bill in equity in 1893, they failed to show an acquirement of title by adverse possession for twenty years.

He ordered judgment for the demandants, and reported the case for determination by this court. If the rulings made were right and there should be judgment for the demandants, judgment was to issue as ordered. If not, such disposition was to be made of the case as this court might determine.

A. E. Avery, (E. Avery with him,) for the tenants.

W. P. Kelley, for the demandants.

BRALEY, J. By the parol contract the tenants' mother, the purchaser, entered into the exclusive occupation of the demanded premises in 1872, which continued until her death in 1910. The title, however, was not to pass until the consideration had been paid, and in 1882, having rendered the services agreed upon, she asked for a deed in accordance with the agreement. But, although assured that the vendor's promise would be kept, no deed ever has been given, and the demandants, who under intermediate devisees have succeeded to the record ownership, now seek to recover the land.

It is settled by our decisions in *Sumner v. Stevens*, 6 Met. 337, 338, *Wheeler v. Laird*, 147 Mass. 421, and *Bond v. O'Gara*, 177 Mass. 139, that where under an oral contract for the sale of lands the purchaser enters and continues in unopposed and exclusive occupancy, his intention to take as owner is manifest, and until the owner of record asserts his title and regains possession the occupation by the purchaser is adverse. The purchaser having fully performed her part of the contract in 1882, performance by the vendor then became due. If thereafter the possession of the tenants' ancestor uninterruptedly continued for twenty or more years, the action was barred in 1902, nine years before the date of the writ. Pub. Sts. c. 173, § 2; c. 196, § 1. R. L. c. 179, § 2; c. 202, §§ 20, 22. *Brown v. King*, 5 Met. 173. *Johnson v. Bean*, 119 Mass. 271. *Bigelow Carpet Co. v. Wiggin*, 209 Mass. 542. *Melvin v. Proprietors of Locks & Canals*, 5 Met. 15.

The demandants contend, that the proceedings in equity instituted in 1893, when they proposed to eject the tenants' mother from the premises, interrupted the running of the statute. It is true that, while she sought injunctive relief to prevent a threatened eviction, the bill also asked for specific performance, and upon demurrer it was dismissed. But this was an incident or a part only of her claim of exclusive ownership in bar of the attempt of ouster. The right to stop the acquisition of a prescriptive title, is a right possessed by the record owner of the land or his privies in estate. It is for this reason that the possession of the disseisor must be open and notorious or it is not adverse. *Currier v. Gale*, 3 Allen, 328, 330. A demand for a record title by a purchaser in possession, to which but for the statute of frauds no defence is shown by the report, was not as matter of law incon-

sistent with the assertion of any and all other rights enabling her to retain the premises. *Jordan v. Riley*, 178 Mass. 524. *Bond v. O'Gara*, 177 Mass. 139, 143. The allegations of the bill were not conclusive proof that the claim of ownership had been subordinated to the sole contingency of obtaining the promised conveyance, and that all other rights had been abandoned, but disclose an intention to rely upon every ground of affirmative defence when her rights were unjustifiably ignored and assailed. The ruling having been unqualified that the proceedings in equity stopped the running of the statute, as well as negatived any claim to the acquisition of title by prescription, it was erroneous, and the tenants under the terms of the report are entitled to judgment.

So ordered.

METROPOLITAN LIFE INSURANCE COMPANY vs. INSURANCE
COMMISSIONER.

Suffolk. December 7, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Insurance, Life, Accident. Words, "Cost."

Under St. 1912, c. 524, which provides that a foreign life insurance company, if permitted to do so by its charter or by the State in which it is incorporated, may insert in its life insurance contracts provisions for certain features of accident insurance, "which provisions shall state the special benefits to be granted thereunder and the cost of such concessions to the insured," a policy of life insurance proposed by such a company is in proper form if, after a provision in which the permitted elements of accident insurance are included, it states, "This provision is granted without additional cost to the insured," there being nothing in the statute which requires the insurance company to divide the premium charged and apportion it between the life and the accident insurance covered by the policy.

RUGG, C. J. This is a petition brought under St. 1907, c. 576, § 75, praying for a review of the action of the insurance commissioner with respect to the form of an insurance policy proposed to be issued in this Commonwealth by the petitioner, an insurance corporation organized under the laws of New York. The case was reserved by the single justice for our determination.

It was decided in *Ætna Life Ins. Co. v. Hardison*, 199 Mass.

181, that under the statutes then in force accident insurance could not be issued in combination with life insurance in one policy. Thereafter, St. 1912, c. 524, was passed, by which it was enacted that any foreign life insurance company, if permitted by its charter or the law of its domicile, might incorporate in its life insurance contracts certain features of accident insurance "which provisions shall state the special benefits to be granted thereunder and the cost of such concessions to the insured." * Thereupon, the petitioner proposed a form of life insurance in which were combined elements of accident insurance, which concluded with the statement, "This provision is granted without additional cost to the insured." The point to be decided is whether a policy in this form is a compliance with St. 1912, c. 524.

Interpreting the words according to their natural meaning, such a policy satisfies the statute. It is "the cost of such concessions to the insured" which must be set forth in the policy. If the company makes no charge for the concession, then it does not cost the insured anything. The sense in which "cost" is used is actual and not estimated cost. It must relate to the present and not to any future or postponed date, because it must be stated in the policy. Of course such an insurance must cost the insurer something, but the statute does not require that the cost to the insurer must be written into the policy. Obviously that is a different thing from the "cost to the insured." The respondent contends that the words "to the insured" in the statute modify the word "concession" and not the word "cost." But that seems to be a

* The whole of the provision of St. 1912, c. 524, here referred to is as follows: "Contracts of insurance for each of the classes specified in section thirty-two [of St. 1907, c. 576] shall be in separate and distinct policies notwithstanding any provision of this act which permits a company to transact more than one of said classes of insurance; except that any domestic life insurance company, notwithstanding any limitations of its charter to the contrary, and any foreign life insurance company authorized to transact business in this Commonwealth, if it is permitted so to do by its charter or by the State in which it is incorporated, whether or not it has a capital stock, may incorporate in its policies of insurance provisions for the waiver of premiums or for the granting of special surrender values therefor in the event that the insured thereunder shall from any cause become totally and permanently disabled, which provisions shall state the special benefits to be granted thereunder and the cost of such concessions to the insured, and shall define in such policies what shall constitute total and permanent disability."

constrained rather than the obvious construction of the phrase in the connection in which it is found. Cost to the company is something which cannot be ascertained at the time the policy is issued. The only kind of cost capable of statement in the policy must be an estimated or approximated cost founded upon calculations based on experience, or on analogies. Moreover, the cost to a company like the petitioner well might be a different sum than the premium charged, or the proportion of it apportioned to the accident feature of the policy.

If it was the purpose of the Legislature (as contended by the respondent) to make it compulsory upon the insurance company to divide the premium charged and apportion it between the life and the accident features of the policy, the language employed in the statute is inapt to express that purpose. It is not reasonably susceptible of that construction.

It is contended by the respondent that a different meaning should be attributed to the words of the statute, because otherwise the maintenance of proper reserve funds cannot be required. But this result does not follow. The insurance commissioner is not confined by St. 1907, c. 576, § 11, as amended by St. 1912, c. 74, to an inflexible rule of computing the reserve, but is given power to employ such methods as he in the exercise of a sound judgment thinks the extra hazard assumed by the company by this addition to the strict life insurance liability may demand.

The question of taxation is not raised clearly on this record. It was assumed in *Metropolitan Life Ins. Co. v. Insurance Commissioner*, 208 Mass. 386, that the company was taxed under St. 1909, c. 490, Part III, § 30. But it is argued by the respondent that it is taxed under § 26 of the same Part of the tax law. However that may be, it is enough to say that the words now presented for construction in St. 1912, c. 524, are too plain to be interpreted otherwise than has been indicated, even though some effect upon the tax law may be wrought. If a mistake or injustice or oversight in this respect has been made, it is not for the court but the Legislature to make the correction. The form of insurance policy presented by the petitioner is not prohibited by law in this Commonwealth.

So ordered.

G. W. Cox, for the petitioner.

L. R. Eyges, Assistant Attorney General, for the respondent.

COMMONWEALTH vs. NORTH SHORE ICE DELIVERY COMPANY
& others.

Suffolk. December 7, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Monopoly. Restraint of Trade.

The contracts, agreements, arrangements or combinations in violation of the common law which under St. 1908, c. 454, the Attorney General by a suit in equity in the name of the Commonwealth may enjoin are of three classes: first, those that establish or maintain a monopoly in the manufacture, production or sale in this Commonwealth of any article or commodity in common use, second, those that prevent or restrain competition in the manufacture, production or sale of any such article or commodity, and, third, those that by establishing or maintaining such a monopoly prevent or restrain the free pursuit in the Commonwealth of any lawful business, trade or occupation.

A combination of ice dealers in a territory in and near which are waters suitable for obtaining ice readily available to any one wishing to go into the business, made by means of contracts by which these dealers agree to dispose of their plants for the delivery of ice and to sell their ice to a delivery company that maintains the necessary wagons and plant for delivering ice to the consumers, is not a monopoly of gathering, storing, selling or delivering ice under St. 1908, c. 454, and, where the competition of other ice dealers in the territory, instead of being diminished by the formation of this arrangement for delivery, has increased since that formation, there is under that statute no restraint of competition nor prevention of any person from the free pursuit of the lawful business of gathering, storing, selling or delivering ice in the territory in question.

Under St. 1908, c. 454, which provides that the Attorney General in the name of the Commonwealth may maintain a suit in equity to enjoin monopolies, restraints of competition and the prevention of the free pursuit of any lawful business in violation of the common law in the manufacture, production or sale in this Commonwealth of any article or commodity in common use, the power of a combination of dealers to enhance "temporarily" the price of an article in a certain territory is not decisive to show a violation of the statute, and in the present case, where it was plain upon all the findings that any such enhancement must be of very short duration, if made at all, it was held that there was no violation of the statute.

Under St. 1908, c. 454, which provides that the Attorney General in the name of the Commonwealth may maintain a suit in equity to enjoin monopolies, restraints of competition and the prevention of the free pursuit of any lawful business in violation of the common law in the manufacture, production or sale in this Commonwealth of any article or commodity in common use, an advantage obtained by superior business efficiency, which makes it more difficult for another person to enter that business because he must compete with the results of such efficiency, is not within the prohibition of the statute.

SHELDON, J. This bill in equity is brought by the Attorney General in the name of the Commonwealth under St. 1908, c. 454, § 2.

The first section of that act reads as follows: "Every contract, agreement, arrangement or combination in violation of the common law in that thereby a monopoly in the manufacture, production or sale in this Commonwealth of any article or commodity in common use is or may be created, established or maintained, or in that thereby competition in this State in the supply or price of any such article or commodity is or may be restrained or prevented, or in that thereby, for the purpose of creating, establishing or maintaining a monopoly within this State of the manufacture, production or sale of any such article or commodity, the free pursuit in this State of any lawful business, trade or occupation is or may be restrained or prevented, is hereby declared to be against public policy, illegal and void." The Sts. of 1911, c. 503, 1912, c. 651, and 1913, c. 709, passed apparently with reference to the same subject matter are not material upon the questions here presented.

It will be well to look at the scope and object of this act before considering its effect upon the facts of this case. The act forbids, and gives a specific remedy against, not every agreement, arrangement, or combination which involves a violation of the common law, but only those particular agreements, arrangements and combinations which violate that law in three stated respects: first, that they create, establish or maintain a monopoly in the manufacture, production or sale in this Commonwealth of any article or commodity in common use; secondly, that thereby competition in this Commonwealth in the supply or price of any such article or commodity is or may be restrained or prevented; thirdly, that for the purpose of creating, establishing or maintaining a monopoly, such as has been stated, the free pursuit in this Commonwealth of any lawful business, trade or occupation is or may be restrained or prevented. All other acts, agreements or combinations, tending toward the restraint of trade or the practical control of any business or occupation, are left to be dealt with under the remedies afforded by the common law. It is only to restrain the doing of acts forbidden or declared illegal by the statute itself that the remedy given by its second section

can be resorted to. The question before us is, therefore, whether the acts found to have been done by the defendants are included in either one of the three classes above stated.

Careful and complete findings of fact have been made by the judge who heard this case. They need not be repeated in detail. But in our opinion it appears from those findings that what has been done by the defendants does not come within the first class of the acts forbidden by the statute. What they have done is in substance to do away with the useless and expensive competition that had existed among themselves in the delivery of ice. Those of the defendants who before April, 1913, were engaged in the gathering, storing and selling of ice have agreed to dispose of their plant for the delivery of ice to their customers and to sell their ice to the Delivery Company (as the defendant first named in the bill will hereafter be called), which company in its turn maintains the necessary wagons and plant, for the delivery of the ice to the consumers thereof. These agreements have been carried out, and in this way the useless multiplication of delivery wagons has ceased to be needed, and an expense which was largely a mere waste of time, energy and money has been saved to the defendants. But it cannot be said that by this means a monopoly of either gathering, storing, selling or delivering ice has been created or maintained. It has been found that there are waters which may be used for the obtaining of ice in and near to this territory readily available as a source of supply to any one wishing to go into the business. There is apparently no difficulty in gathering and storing ice in whatever quantities may be necessary. The same thing is true as to its delivery, upon the findings that have been made. There were before the action of the defendants other independent ice dealers or pedlers engaged in the sale and delivery of ice in the territory supplied by the defendants. Since that time, some of these dealers have increased the number of delivery teams operated by them, and several new dealers have entered into the business, all in competition with the Delivery Company. Thus it appears that there has not been created or maintained any monopoly in the sale or delivery of ice in this territory. Nor do we see how it can be said that the acts of the defendants in eliminating one part of a useless and expensive competition among themselves can have, as matter of law, any

tendency toward the creation of a monopoly in either the gathering, the storing or the sale and delivery of ice. There is nothing to hinder any one who chooses to do so from engaging in competition with the defendants, as several persons in fact have done. There is an abundance of ice to be had; facilities for its storage can be obtained without difficulty; horses and wagons or motor trucks can be bought and drivers and other employees can be hired by any one who desires to go into the business; and the article to be sold is not one, of which either the supply or the means of sale and delivery can be readily controlled or "cornered."

For like reasons, upon the facts found, we cannot say that the defendants' acts have been such that thereby competition in the supply or the price of ice is or may be restrained or prevented. The supply of ice is practically unlimited in this vicinity; the price has not been increased since the arrangements of the defendants were made. Although competition between most of the defendants in one branch of their business at least has been eliminated, what they have done is far from destroying or tending to destroy competition with them by other dealers. It is expressly found that the effect of the formation of the Delivery Company has not been such as to prevent or preclude other persons from entering into the ice business. Indeed, as we have seen, the competition of other dealers, instead of being diminished, has been increased since that formation.

As to the third class of conduct inhibited by the statute, it is manifest that nothing which the defendants have done has restrained or prevented any person from the lawful pursuit of the business of gathering, storing, selling or delivering ice in Lynn or its neighborhood, or tended toward such restraint or prevention, nor did the defendants intend to bring about such a result. This has been found almost in terms.

The Attorney General has not contended that the findings made were not warranted by the evidence. But he has contended strongly that upon some of those findings the bill can be maintained. It has been found that the Delivery Company has the power to advance temporarily the price of ice in Lynn and Nahant; that though the effect of the formation of the Delivery Company has not been and was not intended to be to prevent other

persons from entering into the ice business, yet it now is more difficult for any person to enter into that business because of the efficiency with which the Delivery Company is able to transact its business; that the defendants have not monopolized or attempted to monopolize the production, supply or delivery of ice, "except as herein [in the report of facts found] expressly set forth;" and the same exceptions made to the finding that no restraints upon competition have resulted from the acts or conduct of the defendants. But these findings cannot alter our conclusion. A power to enhance merely "temporarily" the price of an article is not decisive upon any of the issues raised here; and it is plain, upon all the findings, that any such enhancement must be of very short duration, if made at all. That the efficiency with which a man of affairs carries on his business would tend to discourage competition with him to the extent found here is likewise far from being decisive. The law does not seek to deprive any person of the advantage coming from the superior qualifications with which nature may have endowed him or which he may have acquired by well directed and persistent efforts. Certainly an advantage obtained by such efficiency is not within the ban of the statute under which this bill is brought. And, as to the exceptions that have been stated in the findings, it is enough to say that we have been able to discover nothing "expressly set forth" in the findings which requires or permits us to reach the conclusion that in either one of the three respects which have been stated the defendants' conduct has constituted a violation of the statute.

We have considered carefully all the arguments which have been addressed to us, and, although we have cited none of them, we have examined all the decisions to which our attention has been called. Each case must depend upon its own circumstances. The facts proved in this case do not come within the purview of our statute; and accordingly we are clearly of opinion that the decree dismissing the bill must be affirmed.

So ordered.

Lee M. Friedman, for the Commonwealth.

H. Parker, (*H. H. Fuller & H. E. Miller* with him,) for the defendants.

B. N. Johnson, for the Essex Trust Company, submitted a brief.

ALICE A. MITCHELL vs. WALTER E. COBB & others.

Plymouth. December 8, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, & DE COURCY, JJ.

Land Court. Practice, Civil, Appeal.

Whether under the procedure of the Land Court a "decision" of that court is something more than a finding of facts in an action of law and is a matter from which an appeal can be taken, here was mentioned as a question that was not decided, it being assumed for the purposes of the present case that there might be such an appeal which would present a question of law for determination by this court, although the present appeal presented no such question.

Where a case was brought before this court by an "appeal from the finding and decision" of the Land Court, and the paper entitled "Decision" was a simple finding of facts with a narration of some evidence, on which it could not be determined whether the conclusion of the judge was warranted or not, and, although there was a reference to certain plans, they were not made a part of the record, and no ruling of law appeared to have been made, or, if any was made, it was not brought before this court for review, no question of law being raised upon the record, it was ordered that the appeal be dismissed.

RUGG, C. J. This case is brought up by an "appeal from the finding and decision" of the Land Court. If it be assumed in favor of the appellant, but without so deciding, that a "decision" under the Land Court procedure is something more than a finding of facts in an action at law, *Cressey v. Cressey*, 213 Mass. 191, and is a matter from which an appeal lies, *Welsh, petitioner*, 175 Mass. 68, 70, *Welsh v. Briggs*, 204 Mass. 540, 549, no question of law is raised upon this record.

The paper entitled "Decision" is a simple finding of facts with a narration of some evidence. Whether the conclusion of the judge was warranted or not cannot be determined. The evidence is not reported. There is reference to plans, but they are not a part of the record. No ruling of law appears to have been made. But, if any was made, it is not set out in such way as to be subject to review. See *Hutchins v. Nickerson*, 212 Mass. 118; *Weil v. Boston Elevated Railway*, 216 Mass. 545.

Appeal dismissed.

The case was submitted on briefs.

M. O. Adams & R. O. Harris, for the respondent Cobb.

G. F. James, for the petitioner.

GEORGE A. CRAWFORD & others, trustees, *vs.* LEOPOLD A. NIES
& others, trustees.

Suffolk. December 8, 1914. — December 31, 1914. }

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Equity Pleading and Practice, Multifariousness. Charity. Trust, Charitable. Religious Society. Constitutional Law. Bromfield Street Methodist Episcopal Church in Boston. Equity Jurisdiction, To determine validity of election of trustees of church.

In a suit in equity to determine what persons as trustees are entitled to the possession of certain funds to be held upon a charitable trust, where all the persons claiming the right to act as such trustees have been joined as parties and where the defendants have proceeded without objection to a general hearing upon the merits before a master, whose report covers the whole case as set forth in the bill, it is too late for the defendants to raise the objection that the bill is multifarious.

A deed of land to trustees to hold it forever in trust and to erect thereon a house of worship "for the use of the members of the Methodist Episcopal Church in the United States of America according to the rules and discipline which from time to time may be agreed upon and adopted" is a public charitable trust in perpetuity.

The power of the Legislature to terminate a public charitable trust for the support of a well recognized sect of the Christian religion is open to grave doubt, but there is no doubt of the power of the Legislature to authorize the trustees under such a trust to sell a particular piece of land freed from trusts for the maintenance of a building for religious worship and to hold the proceeds of the sale subject to the terms of the trust.

Whether St. 1892, c. 103, authorizing the trustees of the Bromfield Street Methodist Episcopal Church in Boston to sell and convey the real estate of that church, is susceptible of a construction that would permit a termination by due formalities of the trust on which the property was held before such sale, and *whether*, if the true construction of the statute would permit such a course, the statute in that respect would be a constitutional exercise of legislative power, here were mentioned as questions that had not been presented to the court.

The trustees of the Bromfield Street Methodist Episcopal Church in Boston, who were appointed in 1913 by a decree of the Supreme Judicial Court to hold the property conveyed by the deed of one Jackson to Binney and others in 1806, with the authority to sell the real estate of the church given to such trustees by St. 1892, c. 103, and who sold such real estate for \$400,000, are entitled to hold such proceeds as a trust fund which they are bound to administer according to the trusts established by such deed of Jackson.

Where property is held by trustees "for the use of the members of the Methodist Episcopal Church in the United States of America according to the rules and

discipline which from time to time may be agreed upon and adopted," and where the discipline of the church provides that questions relating to the election of such trustees shall be determined within the church by appeal to the appropriate conference, resort cannot be had to the courts to determine by a suit in equity or otherwise the validity of the election of such trustees until the usual methods of relief within the organization have been tried and found wanting.

Rugg, C. J. This is a suit in equity by four out of nine persons appointed trustees by a decree of the Supreme Judicial Court of Suffolk County and also by one of the trustees in behalf of himself and other members of the Methodist Religious Society in Boston, more commonly known as the Bromfield Street Church, against the Methodist Episcopal bishop for this district and the remaining five of the nine persons appointed such trustees, who are averred to hold certain trust funds unlawfully, to determine what persons as trustees have the right to the possession of those funds. The case was reserved by a single justice of this court for our determination.

The history of the trust is this: In 1806 real estate on Bromfield Street in Boston was conveyed by William H. Jackson to Amos Binney and eight other persons and their successors, to hold "for ever in trust that they shall erect and build or cause to be erected and built thereon a house or place of worship for the use of the members of the Methodist Episcopal Church in the United States of America according to the rules and discipline which from time to time may be agreed upon and adopted . . . and in future trust and confidence that they shall at all times forever hereafter permit such Ministers and preachers belonging to the said Church as shall from time to time be duly authorized . . . and none others to preach . . . therein . . . in further trust and confidence that as often as any one or more of the Trustees . . . shall die or cease to be a member . . . of said church . . . then . . . it shall be the duty of the stationed Minister or preacher authorized as aforesaid who shall have the pastoral charge of the members . . . to call a meeting of the remaining trustees as soon as conveniently may be and when so met the said Minister or preacher shall proceed to nominate" a person or persons to fill the vacancy or vacancies, who shall be voted for by the remaining trustees so that the number shall be kept at nine.

A church edifice was erected upon the lot and the ecclesiastical body which worshipped there had a large membership and was

prosperous for a long time. In recent years the neighborhood has ceased to be residential and the membership has become small. In 1890 a petition was brought in the Supreme Judicial Court for Suffolk County setting forth that the original trustees under the Jackson deed had died and no successors had been appointed in accordance with the terms of that deed, and referring to St. 1808, c. 70, and St. 1828, c. 144, and praying for the appointment of such trustees. The prayer of the petition was granted and trustees were appointed. St. 1892, c. 103, authorized nine persons, who were the trustees named in the court decree, to sell the church and land free from the trusts in the deed of William H. Jackson to Amos Binney and others dated March 24, 1806, and "the net proceeds of sale to be held and disposed of by said trustees for the use of the members of the Methodist Episcopal Church in the United States of America, according to the rules and discipline which from time to time may have been or may be agreed upon and adopted at the general conferences of said church in the United States of America, and the final application of said proceeds, in accordance with said rules and discipline, to be a full discharge of the said trustees, the trusts of said deed being thereupon terminated."

Upon a petition presented in 1913, the court again appointed trustees under the Jackson deed, those appointed in 1892 all having died or resigned, and the real estate was sold for \$400,000 in February, 1913, deeds being executed both by the trustees appointed by the court and by the same persons as trustees of the Bromfield Street Church elected under the ecclesiastical polity of the Methodist Episcopal Church. The plaintiffs are four of these trustees. It was provided expressly in this decree that the trustees so appointed were "to hold, manage or convey said estate upon the trusts and for the purposes set forth in said deed" from Jackson to Binney and "as authorized in Chapter 103 of the act of the year 1892."

The defendants have argued that the bill is multifarious. But it is not so objectionable in this particular that the matter requires consideration now after the defendants have proceeded without objection to a general hearing upon the merits before a master, whose report covers the case at large. See *Bauer v. International Waste Co.* 201 Mass. 197. All the trustees, including those elected

by the church and those appointed by the court, have been joined so that in this respect the proper parties are before the court.

It appears from the allegations of the bill and the admissions of the answer that, although the sale of the Bromfield Street real estate was conducted by the persons who were appointed trustees by the court decree of 1913, it was assumed by a majority of them that they received the proceeds in their capacity as trustees elected by the church as an ecclesiastical organization, and that hence the persons elected each year as trustees by that organization are entitled to the custody of the fund and are to manage it, not according to the trusts of the Jackson deed of 1806. It does not distinctly appear from the record upon what terms and trusts, if any, these church trustees claim to hold and manage the fund. It is stated in their brief, however, that "the turning over of the proceeds of sale to the trustees of the local society was a 'final application of said proceeds in accordance with said rules and discipline,' which terminated the trust created by the old deed. Chapter 103 of the Acts of 1892. The proceeds are now held by the defendant trustees as funds of the church, to be disposed of according to its discipline." This is all that is said about that subject in the brief for the defendants. This hardly goes to the root of the matter. The master makes no specific findings upon this branch of the case. Apparently the hearing before him was not directed to the point, although he does make findings as to the authority of trustees elected by the church to hold property.

The Jackson deed of 1806 created a public charitable trust in perpetuity. The general support of a well recognized sect of the Christian religion is a trust of that character. *Chase v. Dickey*, 212 Mass. 555, 566, and cases there collected. That instrument provided in plain terms a method for perpetuating the board of trustees to the full number of nine. It vested the legal title of the real estate in the trustees for the use of the ecclesiastical body which might worship in the church edifice erected on the land. *Worcester City Missionary Society v. Memorial Church*, 186 Mass. 531. Its scheme was that the trustees should own and hold the title to the church property for the benefit of those who might worship there in a way somewhat analogous to the ownership of the building by the society in the Congregational and Baptist forms of parish administration, and its occupancy by the body

known as the church. See *Massachusetts Baptist Missionary Society v. Bowdoin Square Baptist Society*, 212 Mass. 198.

The record does not disclose any legal transfer of the corpus of this trust to any others than the successors of the original trustees of the Jackson deed. On the contrary, the appointment by the court in 1890 and again in 1913 of trustees to execute the terms of the trust created by the Jackson deed shows that it has been kept alive and has been treated as vitally existent. It is not necessary to discuss the power of the Legislature to terminate such a trust. It is enough to say that its constitutional power to do so is open to such grave doubt, *Cary Library v. Bliss*, 151 Mass. 364, that it cannot be presumed that it would be undertaken except by a statute phrased in unequivocal words. The power of the Legislature to authorize the sale of a particular piece of land freed from trusts for the maintenance of a building for religious worship created by its original deed of conveyance to religious uses, may not be doubted. *Old South Society v. Crocker*, 119 Mass. 1, 26. But that is a very different matter from terminating the trust. The resort twice to the court for the purpose of appointing trustees under the Jackson deed, the last time being on the eve of the sale of the property, demonstrates that up to that time there had been no attempt to end the trust. It does not appear that the trustees last appointed, all of whom are parties hereto, have undertaken with a definite purpose to that end to act under the final clause of St. 1892, c. 103, or place any interpretation upon that portion of it which speaks of a "final application of said proceeds," or to do the thing which may be thought to terminate "the trusts of said deed." It perhaps may be inferred that they or a majority of them have assumed that the church trustees somehow have become vested with power over this fund. If the trustees appointed by the court in 1913 have taken any steps looking toward a termination of the Jackson trust and turning the funds over to the church trustees, the record does not disclose the facts. The bald assumption that trustees annually elected by the church and not at all in accordance with the terms of the Jackson deed of trust have supplanted the trustees appointed by the court expressly to execute the trusts of the Jackson deed cannot be supported by simple reference to St. 1892, c. 103. See *Peabody v. Eastern Methodist Society in Lynn*, 5 Allen, 540;

Westminster Presbyterian Church v. Presbytery of New York, 211 N. Y. 214. Whether that statute is susceptible of a construction which will permit a termination of the trust after due formalities had to that end, and whether, if its true construction permits such course, then it would be a constitutional exercise of legislative power, are questions of vital importance to be determined before it can be said that the Jackson trust has been ended. These questions have not been argued. It is possible that there may be facts not fully before us which may have a bearing upon this issue. We prefer not to pass upon these questions until a record is prepared with a purpose to present them and until they have been argued. It is enough to say that upon the record as it now stands the trustees appointed by the court decree of 1913 are entitled to the corpus of the trust fund and they are bound to administer it according to the trusts established by the Jackson deed.

The plaintiffs complain that the transfer of one hundred and ninety-eight members of the Eighth Methodist Religious Society to the Bromfield Street Church was illegal. But the finding of the master is explicit to the effect that under the discipline of the Methodist Episcopal Church it was the absolute right of those persons thus to be transferred. As the evidence upon which this finding was founded is not reported, the finding must be accepted as a fact. Subsequently the remaining members of the Eighth Society transferred their membership to the Bromfield Street Church. This, too, is found by the master to have been done regularly according to the discipline of the church and for the same reason cannot be disturbed. The same is to be said respecting the order of the bishop consolidating the two societies and the effect of such consolidation upon the membership of the quarterly conference.

The request for a ruling that the election of the board of trustees of the church was irregular could not have been granted. Whether it was irregular or not, the discipline of the church provided that that question should be determined within the church by appeal to the appropriate conference. Resort cannot be had to the courts to determine the legality of such a matter until the usual channels of relief within the organization have been tried and found wanting. *Hickey v. Baine*, 195 Mass. 446. *Correia v. Supreme Lodge of Portuguese Fraternity*, 218 Mass. 305.

The other matters of which the plaintiffs complain relate to findings of fact as to which the master's report must be accepted as final for the reason already stated.

A decree is to be entered declaring that the trustees appointed by the court decree of 1913 are entitled to the proceeds of the sale of the Bromfield Street real estate and are to hold them in accordance with the trusts of the Jackson deed of 1806.

Ordered accordingly.

A. G. Sleeper, for the plaintiffs.

H. N. Shepard, for the defendants.

HANNAH H. DRAPER vs. JOHN VARNERIN.

Suffolk. December 8, 1914. — December 31, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, & DE COURCY, JJ.

Way, Private. Easement, Extent of.

Where the separate owners of two lots of land, with a strip of land ten feet wide owned in common by them lying between the two lots, established by agreement a right of way to be used in common over the whole strip and one of the owners with the consent of the other constructed a way over the whole strip for their common use, a successor in title of the other owner has no right to change the grade of any part of the way, and if he digs away the land on his side of the strip so as to leave the level of one half of the way a number of feet below the other half, he can be restrained in a suit in equity brought by the other owner from making any further encroachments on the way and can be ordered to restore the way in so far as possible to its original condition.

BILL IN EQUITY, filed in the Superior Court on April 9, 1914, alleging that the plaintiff was the owner of a parcel of land with a dwelling house thereon numbered 78 on Bower Street in the part of Boston called Roxbury, that on the southwesterly side of the plaintiff's lot was a passageway ten feet wide, of which the plaintiff owned in fee an undivided half interest, and over the whole surface of which the plaintiff had a right of way, that the defendant owned the other undivided half in the fee of the passageway and also had a right of way over its surface, that the land of the defendant adjoining the passageway was eleven feet lower

in grade than the land of the plaintiff and that the defendant had excavated the half of the passageway adjoining his land to the depth of eleven feet, thus obstructing the way and rendering it unsafe and unfit for travel and had removed the lateral support of the remaining portion of the passageway, in consequence of which the entire strip of ten feet of land by the action of the elements was being washed away and reduced to the level of the adjoining land of the defendant, and that the house numbered 78 Bower Street was let by the plaintiff to various tenants whose only access to Bower Street was by passing over the passageway in question; praying that the defendant might be restrained from interfering further with the passageway and that he might be ordered to restore the excavated portion and to construct a proper retaining wall to hold the soil of the passageway in position, and for damages.

The defendant in his answer alleged that whatever he had done to the passageway was done by way of constructing it in accordance with an indenture between the plaintiff and the defendant's predecessor in title by reducing its grade to a reasonable one which was the same as that of Bower Street to which it gave access. The defendant also filed a cross bill.

The defendant was the successor in title of one Arthur Binney, to all of whose rights and obligations he had succeeded. A copy of the indenture referred to above was annexed to the bill. Omitting the attestation clause and the signatures, it was as follows: "This indenture made this first day of June, A. D. 1889 by and between Arthur Binney and Hannah H. Draper, both of Boston in the County of Suffolk and Commonwealth of Massachusetts, witnesseth; That, whereas, the said Arthur Binney and Hannah H. Draper are owners as tenants in common of a certain strip or parcel of land situated on the southwesterly side of Bower Street in that portion of Boston formerly Roxbury, said parcel of land having a frontage of ten feet on said street and a depth of ninety-seven feet, for a full description of said parcel of land reference may be had to deed of said Arthur Binney to said Hannah H. Draper of even date herewith and to be recorded with Suffolk deeds; and, whereas, the said Arthur Binney and Hannah H. Draper propose to use said strip of land as a passage-way, from said Bower Street to the lands adjoining said strip, they do hereby

covenant and agree each with the other for themselves, their heirs and assigns that the whole of said strip of land shall be forever kept open as a passage-way, as aforesaid, to be used in common by the said parties to this agreement, their heirs and assigns forever. It being mutually understood and agreed that the cost of constructing said passage-way and keeping the same in repair shall be shared equally by the parties to this agreement, their heirs and assigns."

The case was heard by *Wait*, J., who made the following memorandum of decision:

"Mrs. Draper and Arthur Binney made an agreement, a copy of which is annexed to the bill, with regard to the use of a strip of nine hundred and seventy square feet owned by them in common. Shortly thereafter Mrs. Draper, in connection with building upon her land, prepared the surface of the strip for use. The natural grade of the land made its use, as so laid out, impossible for teams, owing to its height above Bower Street. To use the way for teams requires that it be cut down. Such change of grade would be advisable, though it would involve placing Mrs. Draper's houses in such a position that they would need further support.

"Varnerin, who holds through mesne conveyances from Binney, cut down his land, and proposed to grade the passageway so that teams could reach the rear part of it. His use of his premises was a reasonable and proper one. The changes desired by him are reasonable, and without change of grade in the passageway it will now be practically impossible for Varnerin to derive any benefit whatsoever from his ownership in the nine hundred and seventy square feet strip.

"I find that the plaintiff constructed the passageway in question under the provisions of the agreement, and that the natural grade of the premises was somewhat changed at that time, in order to render the strip serviceable as a way to the plaintiff's houses.

"The surface has never been graded with a view to a use of the passageway most beneficial for the premises of the defendant.

"Against the protest of the plaintiff, the defendant has dug away earth in the passageway and intended to change very materially the grade of the way, both natural and as constructed by the plaintiff.

"Under the law as laid down in *Killion v. Kelley*, 120 Mass. 47, I feel constrained to order the cross bill dismissed, and a decree for the plaintiff on the original bill restraining encroachment, and requiring the return of the premises to the condition existing before the acts of the defendant, as nearly as may be."

By order of the judge a final decree was entered ordering that the cross bill be dismissed; that the defendant to the original bill be restrained from making or permitting to be made any further encroachment upon the passageway described in the bill; that the defendant be ordered to restore the passageway, as nearly as might be, to the condition in which it existed before the excavation made by him, such restoration to take place on or before August 20, 1914; that, if it should become necessary for the defendant to construct a retaining wall, such retaining wall should be constructed in a good and workmanlike manner and of sufficient thickness, not less than twenty inches at the base, to withstand all pressure reasonably to be expected to be exerted against it; that it might be placed entirely on the ten foot strip, provided it should not be so placed or constructed as to interfere with or obstruct the use of the entire ten foot strip as a passageway; and that all reasonable care and precaution should be used in the construction of such retaining wall to avoid unnecessary delay and unnecessary injury to the plaintiff's property and to her pipes in the ten foot strip.

Varnerin, as the defendant in the original suit and as the plaintiff in the cross suit, appealed from the final decree.

The case was submitted on briefs.

G. E. Curry, for the defendant.

H. C. Dunbar, for the plaintiff.

BRALEY, J. The excavations and changes in grade which the defendant has made in the way, where he had only an easement of passage and the right to make reasonable repairs, having altered to the plaintiff's injury and damage the way as constructed by her with the consent of the defendant's predecessor in title, the cross bill was properly dismissed, and the decree restraining any further encroachments and ordering the defendant to restore the way in so far as possible to its original condition should be affirmed with costs. *Killion v. Kelley*, 120 Mass. 47. *Lipsky v. Heller*, 199 Mass. 310. *Cornell-Andrews Smelting Co. v. Boston & Providence*

Railroad, 202 Mass. 585. *Kaatz v. Curtis*, 215 Mass. 311. *Downey v. H. P. Hood & Sons*, 203 Mass. 4, 11. *Szathmary v. Boston & Albany Railroad*, 214 Mass. 42.

Ordered accordingly.

ARTHUR BOOKI *vs.* PULLMAN COMPANY.

Suffolk. December 9, 1914. — December 31, 1914.

Present: BRALEY, SHELDON, DE COURCY, & PIERCE, JJ.

Removal of Suits.

On the filing of a petition and a proper bond under the Judicial Code, U. S. St. 1911, c. 231, §§ 28, 29, for the removal of an action of tort from the Superior Court to the District Court of the United States, the provision of § 29, that "It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit," must be obeyed, although the petition contains no allegation that "written notice of said petition and bond for removal" were "given the adverse party or parties prior to filing the same" as required by the statute; the want of notice being a matter of defence to the petition for removal, which can be asserted or waived upon a motion in the United States District Court to remand the case to the State court.

PIERCE, J. This is an appeal, by the plaintiff in an action of tort for personal injuries, from an order of the Superior Court accepting the defendant's petition under the Judicial Code, U. S. St. 1911, c. 231, §§ 28, 29, approving its bond and ordering that the case be removed to the United States District Court.

It is not disputed that the petition alleges every jurisdictional fact, other than that of notice, required by the Judicial Code, and that, if the absence of the allegation of notice be disregarded, it became the duty of the court, if the petition was accompanied by a proper bond (as it was), "to accept said petition and bond and proceed no further in such suit." Nor is it denied in such case that it was the further duty of the court to make a formal order for removal; indeed if it failed so to do, the cause nevertheless stood removed. *Wabash Western Railway v. Brow*, 164 U. S. 271.

Before the passage of the code the court proceeded *ex parte*; its duties were largely ministerial, and only in the smallest sense of the term judicial. *Goins v. Southern Pacific Co.* 198 Fed. Rep.

432. It had the duty of passing upon the formal appearance of the record and nothing whatsoever to do with defects, irregularities or the truth of the facts alleged. To be sure it could retain the case if the record did not seem to it to disclose a case for removal, but it did this at the peril of having its judgment set aside as erroneous by the Supreme Court of the United States. *Stone v. South Carolina*, 117 U. S. 430.

The Judicial Code re-enacted, with some formal changes not material to this issue, the then existing law, but after stating that "It shall . . . be the duty of the State court to accept said petition and bond and proceed no further in such suit," added these words: "Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same."

The plaintiff's complaint is that it is nowhere alleged in the defendant's petition that such a notice was given him before the filing of the petition. He does not in terms charge that written notice was not in fact given, but that the defendant has not set out in his petition, in any form of words, that it has been given.

Inadvertent failure to allege performance of a statutory condition, due to accident, mistake or waiver, is made to stand on the same footing as wilful and intentional non-compliance with the provision of the act. If written notice should have been in fact given or waived and the petition should fail so to state, it is at least doubtful whether the Superior Court had power to permit an amendment after the expiration of the time within which a petition must be filed. *United States v. Sessions*, 205 Fed. Rep. 502.

Such a requirement of notice is not merely formal, neither is it jurisdictional in a broad sense, but it is substantial, and if it is not waived and is insisted upon, may require the United States District Court to deny its jurisdiction and remand the case to the State court. *Arthur v. Maryland Casualty Co.* 216 Fed. Rep. 386. As the State court has not power to pass upon the fact of notice or waiver thereof, and as the inference arising from the failure to allege notice may result in a denial of right, it would seem that the act should be so construed as not to effect such a result. This may be accomplished without violence to legal precedent by holding that the failure to allege the giving of written notice, like

the failure to allege an evidential writing under the requirement of the statute of frauds, is not as a matter of pleading to be treated as a condition precedent, but as a defence to be asserted or waived, at the election of the plaintiff, at a hearing on a motion to remand in the United States District Court. *Price v. Weaver*, 13 Gray, 272. *Long v. Quinn Brothers, Inc.*, 215 Mass. 85.

Order affirmed.

The case was submitted on briefs.

C. Toye & J. H. Baldwin, for the plaintiff.

B. N. Johnson & A. F. Johnson, for the defendant.

JAMES R. MURPHY & others vs. MAYOR OF BOSTON & others.

Suffolk. December 9, 1914. — December 31, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & DE COURCY, JJ.

Boston. Municipal Corporations, Officers and agents.

A member of the board of appeal of the building department of the city of Boston is a "member of a board" within the meaning of those words as they are used in St. 1909, c. 486, § 14, and under the provisions of that section the mayor may remove any or all of the members of that board by filing with the city clerk a written statement setting forth in detail his specific reasons for such removal.

The power of the mayor of Boston under St. 1909, c. 486, § 14, to remove "any head of a department or member of a board (other than the election commissioners . . .)" is not limited to such officers or members of boards as are not public officers, nor to such as the mayor has power to appoint without confirmation by the city council or the certification of the civil service commission.

It is an adequate reason for the mayor of Boston to assign in removing from office under St. 1909, c. 486, § 14, members of the board of appeal of the building department of that city that such members by certain of their decisions acted contrary to sound public policy by failing to require in the construction of buildings suitable sanitary equipment and sufficient protection to life and property from danger by fire.

The board of appeal of the building department of the city of Boston are not judicial officers.

The fact that no provision is made for a review of the removal by the mayor of Boston, under St. 1909, c. 486, § 14, of the members of a board, is no ground for not giving full effect to such removal when the reason, assigned by the mayor in the written statement filed by him with the city clerk in accordance with the requirements of the statute, is adequate.

RUGG, C. J. This is a petition for a writ of mandamus brought to test the right of the petitioners to continue to hold office as members of the board of appeal connected with the building department of the city of Boston. It is conceded that the petitioners or some of them were members of that board. The point to be decided is whether they have been removed from office by the respondent, who is the mayor of Boston. The determination depends upon the interpretation of St. 1909, c. 486 (hereinafter called the charter) which amended the charter of the city of Boston in important particulars. It is enough to say, without examining its provisions in detail, that one of its main purposes was to vest the chief executive functions of the municipality in the mayor and to confine the activities of the city council to legislative matters, in this respect conforming to the recent trend of legislation respecting the government of cities by centralizing power and responsibility in the mayor. See *Galligan v. Leonard*, 204 Mass. 202.

Section 14 of the charter provides: "The mayor may remove any head of a department or member of a board (other than the election commissioners, who shall remain subject to the provisions of existing laws) by filing a written statement with the city clerk setting forth in detail the specific reasons for such removal, a copy of which shall be delivered or mailed to the person thus removed, who may make a reply in writing, which, if he desires, may be filed with the city clerk; but such reply shall not affect the action taken unless the mayor so determines. The provisions of this section shall not apply to the school committee or to any official by law appointed by the Governor." By virtue of the authority thus conferred the mayor undertook to remove the petitioners from office. So far as concerns form the removal was in accordance with the statute.

The offices held by the petitioners are included within the words of this section, interpreted in their ordinary and literal sense. The members of the board of appeal are members "of a board." "A board to be called the board of appeal" are the descriptive words employed in St. 1892, c. 419, § 12, by which the body was created, and in St. 1907, c. 550, § 6, and St. 1910, c. 631, § 1, by which it has been continued. The board of appeal is a part of the building department, one of the municipal depart-

ments of the city, the head of which belongs to the class of officers subject to removal by the mayor. The fact that § 14 of the charter excepts from its sweeping terms the election commissioners, the school committee and all officers appointed by the Governor, goes far toward demonstrating that no other board or officers were intended by the Legislature to be taken out of the operation of the power of removal by the mayor. The members of the board of appeal were removable by the mayor "for malfeasance, incapacity or neglect of duty" under St. 1892, c. 419, § 12, by which the board first was established. Although no express provision for their removal is found in St. 1907, c. 550, it would seem that they became subject to the power of removal by the mayor "for such cause as he shall deem sufficient and shall assign in his order for removal," as authorized in general terms by St. 1890, c. 418, § 1. Apparently there is no method for their summary removal if they are exempt from this section. Under these circumstances it would require strong implications from other provisions of the statutes to read into the law by inference alone a further exemption from the comprehensive power of removal by the mayor in favor of members of the board of appeal.

It is urged that they are public officers, not agents of the city, and hence not members of the executive department of the city. But public officers are not by reason of the character of service they render less liable to removal than purely administrative officers. Many statutes provide for and regulate the removal of public officers. It is argued also that § 9 of the charter is correlative to § 14 and that only such officers as the mayor may appoint without confirmation by the city council can be removed. There is, however, no such limitation expressed in the charter or discoverable by fair implication. It is unnecessary to decide whether the members of the board of appeal are "subject to confirmation" under St. 1910, c. 631, or to certification by the civil service commission under § 10 of the charter. In any event the power of removal is extensive enough to include them. There is nothing in the character of the service required of the board of appeal which prevents the words expressive of power of removal from having their normal meaning. They are not judicial officers. *Welch v. Swasey*, 193 Mass. 364, 377. Although they may perform some duties of a quasi judicial nature, so also do assessors and

doubtless others who are subject to removal. The provision that the building department and the board of appeal may not be abolished nor any of its powers or duties as established by law be taken away under § 5 of the charter does not imply that in other respects its members are not subject to the general terms of the charter. Indeed, mention of the building department and board of appeal in this section tends to support the contention that the omission in § 14 was intentional and not the result of oversight.

The reason assigned by the mayor in his order of removal is not such as to invalidate his action. In substance it was that the petitioners by certain decisions referred to had acted contrary to sound public policy by failing to require in the construction of buildings suitable sanitary equipment and sufficient protection to life and property from danger by fire. These reasons were adequate on their face. Although no provision is made for a review of the genuineness of these reasons, as in numerous other statutes, that is no ground for not giving full effect to the removal in instances within its scope. Great power is placed in the hands of the mayor. But that is in harmony with modern legislative policy touching the administration of municipal affairs, whereby large authority is reposed in the mayor, who on this account may be held to a high degree of personal responsibility in the administration of the affairs of the city.

Petition dismissed without costs.

H. Parker, (H. H. Fuller with him,) for the petitioners.

J. A. Sullivan, (K. Adams with him,) for the respondents.

ARTHUR C. THOMSON & others, executors, *vs.* FREDERICK J. CARRUTH.

SAME *vs.* HELEN P. JAMESON & others.

SAME *vs.* MARIANNA J. MARTIN & others.

SAME *vs.* CLARENCE STETSON.

Suffolk. December 9, 1914. — December 31, 1914.

Present: LORING, BRALEY, SHELDON, DE COURCY, & PIERCE, JJ.

Supreme Judicial Court. Probate Court, Amendment, Appeal. Will, Execution.

Where, at the trial before a single justice of this court of an appeal from a decree of the Probate Court allowing a will, the jury found upon issues framed for them that the testator executed the will by signing his name on the margin of its fifth page in the presence of the attesting witnesses and that a subsequent signature made by him between the *in testimonium* and the attestation clauses constituted no part of the will, and where upon exceptions to the rulings of the single justice a rescript was issued by this court ordering that, if within a time named the petitioner for the allowance of the will should move to amend his petition by striking out from the instrument offered for probate the signature between the *in testimonium* and the attestation clauses and the motion should be finally allowed, the exceptions should be overruled, otherwise that they should be sustained, it was *held*, that a single justice of this court had jurisdiction to hear and to grant such a motion to amend the petition and that the motion rightly was allowed by him.

FOUR APPEALS taken by different next of kin from a decree of the Probate Court admitting to probate the will of Charles Herbert Pratt.

The cases previously were before this court upon exceptions taken at the trial before *De Courcy, J.*, of the issue, "Was the alleged will now offered for probate executed according to law?" The decision made at that time is reported in 218 Mass. 524. The rescript issued by this court was as follows: "If within sixty days from the date of this rescript the petitioners shall make a motion to amend their petition by striking out from the instrument offered for probate as the last will and testament of Charles H. Pratt the signature between the *in testimonium* and attestation clauses, and a motion to that effect is finally allowed, the excep-

tions in this case will be overruled. Otherwise the exceptions will be sustained."

Later the petitioners in each of the appeals filed in the Supreme Judicial Court a motion to amend the petition by striking out from the instrument offered for probate the signature between the *in testimonium* and the attestation clauses.

The motions to amend the petition were heard by *Hammond, J.* At the hearing the appellants asked the justice to make the following rulings:

"1. This court has no jurisdiction to grant the motion of the petitioners.

"2. This court has no right to allow a motion to strike out any portion of the original will."

The justice refused to make these rulings and made the following statement and ruling:

"I rule that the motion under that rescript may be filed in this court; . . . I think this motion is properly before this court. I have studied this case in its details to a great extent; I sat in the argument with the full bench; I read the evidence; I have a vivid recollection of it; I have a vivid recollection of the charge to the jury; and in the exercise of my discretion and such knowledge as I have obtained, including the arguments here to-day, I allow the motion.

"In this case I rule that this court has jurisdiction of the motion, and, having so ruled, in the exercise of my discretion the motion is granted."

The appellants excepted to the refusal of the justice to make the rulings requested, and also excepted to the ruling made by him.

S. L. Whipple, (*W. H. Brown & A. C. Vinton* with him,) for the appellants.

C. F. Choate, Jr., for the appellees, was not called upon.

BRALEY, J. The appeals from the decree of the court of probate brought to this court all questions of fact as well as of law involved in the general question whether the instrument propounded should be allowed in whole or in part as the will of the testator. *Old Colony Trust Co. v. Bailey*, 202 Mass. 283, 288, 289.

The jury having found under the issues framed that the testator executed the will when he signed his name on the margin of the fifth page and the witnesses under the attestation clause affixed

their names, his subsequent signature appearing between the *in testimonium* and attestation clauses constituted no part of the will. But, as the decree in the Supreme Judicial Court upon appeal as in the Probate Court must follow the allegations of the petition, which asked for the allowance of the will as it appeared on its face, an amendment became necessary before the instrument could be decreed to be the will of the testator. *Thomson v. Carruth*, 218 Mass. 524.

If after verdict the decree of the Probate Court had been affirmed and the case had been remanded, the amendment would have been made in that court. *Crocker v. Crocker*, 198 Mass. 401.

The appeal, however, was still pending in the Supreme Judicial Court when the rescript went suggesting an amendment. That court had jurisdiction, therefore, to correct an error in the pleadings by allowing the petitioners to amend the petition in accordance with the evidence and the verdict.

The second signature, as we have said, was affixed after the will had been duly executed and had become a completed instrument; and, although not made by a stranger, it is in the nature of an interpolation, which formed no part of the will itself.

The rulings requested by the appellants were rightly refused and the order allowing the amendment is to stand.

Exceptions overruled.

MARY A. O'BRIEN & others vs. MASSACHUSETTS CATHOLIC ORDER OF FORESTERS & another.

Suffolk. October 8, 1914. — January 2, 1915.

Present: RUGG, C. J., LORING, SHELDON, DE COURCY, & CROSBY, JJ.

Fraternal Beneficiary Corporation, Designation of beneficiary. Equity Pleading and Practice, Decree.

If a member of a Massachusetts fraternal beneficiary corporation and a holder of one of its death benefit certificates after the death of his wife designates his cousin as the beneficiary under his certificate upon an agreement by the cousin that he will use the proceeds of the certificate to pay debts of the certificate holder and will hold the balance for the benefit of the certificate holder's children, who will be his sole next of kin, such children after the death of the

certificate holder may maintain a suit in equity to have the designation of the cousin as beneficiary declared invalid, to enjoin the payment of the death benefit to him and to compel its payment to them, although in designating the cousin as beneficiary under the agreement above described the certificate holder had no intent to evade the laws of the Commonwealth or the constitution and by-laws of the corporation and acted under the advice of counsel.

After the hearing of a suit in equity, the judge filed a memorandum of his findings and refused certain requests of the plaintiff for rulings. From a bill of exceptions filed by the plaintiff it appeared that the rulings of the trial judge were wrong but that, upon a proper application of the law to the facts found by the judge, it was clear that the whole case was before this court and that a decree should be made for the plaintiff, and therefore this court under St. 1913, c. 716, § 3, ordered that such a decree be entered.

BILL IN EQUITY, filed in the Superior Court on October 15, 1912, by the surviving children of John F. O'Brien, late of Boston, who constituted his sole next of kin, against the Massachusetts Catholic Order of Foresters, a Massachusetts fraternal beneficiary corporation of which John F. O'Brien at the time of his death was a member and a holder of a death benefit certificate, and one Augustine A. Donovan, a cousin of John F. O'Brien, whom O'Brien after the death of his wife had designated as his sole beneficiary. The plaintiffs alleged that the designation of Donovan as beneficiary was procured through fraud and undue influence on his part and on the part of one Ellen F. Beals and brought this suit to enjoin the payment of the death benefit to Donovan.

The suit was heard by *Jenney, J.*, who filed a memorandum of facts found and rulings made by him. Among other facts, he found that the designation of Donovan as beneficiary was not procured by the fraud or undue influence of Donovan or of Beals, but was the free and voluntary act of O'Brien.

Other material facts found by the judge are stated in the opinion.

The plaintiffs asked for the following rulings among others:

"2. The designation of a beneficiary of the death benefit fund in the defendant association, to be valid, must be of a person within the classes prescribed by statute and the by-laws of the association, and the limitation of beneficiaries to said classes cannot be evaded by the designation of an eligible person who secretly agrees to take the fund as trustee for the benefit of a person or persons ineligible.

"3. The facts and evidence in this case warrant a finding that

the designation of the respondent Donovan as beneficiary was made, not because he was in any sense a 'dependent' or 'relative' of the deceased, but for the express purpose of having said Donovan pay certain creditors of the deceased out of the death benefit fund with perhaps a balance over for himself and said Mrs. Beals or his children. In other words: that said designation was simply an attempt to circumvent the constitution and by-laws of the association and defeat the very purpose for which said mortuary fund was established and one of the principal objects for which the association itself was organized, viz.: 'making suitable provision for the widows, orphans, relatives, and dependents of deceased members' and if the court so finds then said designation is void."

"9. The deceased had no power or authority to dispose of the death benefit fund of the order for the benefit of his creditors directly or indirectly, by will or otherwise, and if the Court finds that the defendant Donovan was named as beneficiary, not that he should have the death fund, or any part of it, for his own benefit, but simply as a subterfuge and under a secret agreement, so that he, being a 'relative' could draw the money for the benefit of certain creditors of the deceased including Mrs. Beals with the remainder if any for the children, then said designation is void so far as the creditors are concerned, and the whole fund in equity belongs to the children."

The judge refused to rule as requested; and the plaintiffs alleged exceptions.

J. A. McGeough, for the plaintiffs.

J. P. Cleary, Jr., for the defendant Donovan.

LORING, J. In contemplation of law the only interest in the death benefit which the deceased (John F. O'Brien) had was a power of appointment and the power of appointment which he had was a limited one. He was limited in making the appointment to his widow, children, relatives or dependents.

If the deceased had undertaken to make an appointment of the death benefit to and among his creditors it would have been an appointment outside the class to which he was limited and void. The appointment to Donovan (who was within the class) on Donovan's agreeing to apply the amount of the death benefit so far as it might be necessary to the payment of his (O'Brien's) debts, was an attempt on O'Brien's part to do by indirection what he

could not do by direct appointment in favor of his creditors and was equally void.

By the terms of the agreement between O'Brien and Donovan, Donovan was to hold the balance left after paying O'Brien's debts in trust for the plaintiffs. It is not necessary therefore to decide whether the appointment to Donovan was wholly void or was void only so far as O'Brien sought to secure payment of his debts out of the fund. And decisions to each proposition are equally in point. *In re Cohen*, [1911] 1 Ch. 37. *Duke of Portland v. Topham*, 11 H. L. Cas. 32. *In re Perkins*, [1893] 1 Ch. 283. *In re Kirwan's Trusts*, 25 Ch. D. 373. *Sadler v. Pratt*, 5 Sim. 632. *Bruce v. Bruce*, L. R. 11 Eq. 371. *Pryor v. Pryor*, 2 DeG., J. & S. 205. *Carver v. Richards*, 1 DeG., F. & J. 548. *In re Marsden's Trust*, 4 Drew. 594. *Daubeny v. Cockburn*, 1 Meriv. 626.

The defendant Donovan has based his contention to the contrary upon the decision in *Kerr v. Crane*, 212 Mass. 224. But the question here presented was not before the court in that case. In that case, as in the case at bar, there was an appointment to one within the class for the benefit of one outside the class. In that respect the two cases are alike. But when that has been stated the similarity between the two cases is at an end. In *Kerr v. Crane* the person who was entitled to the death benefit in case no legal designation was made agreed to the designation made by the deceased outside the class when that designation was made. In addition to that she intervened in the suit of *Kerr v. Crane* and asked to have that agreement carried into effect. That suit was a suit brought to prevent one within the class (who had been designated as a beneficiary for the benefit of one without the class) keeping the money for himself when the person entitled in the absence of the legal designation intervened in the suit and asked to have the designation outside the class carried into effect. But the suit now before us is a suit by those entitled in case no legal designation is made to secure for themselves the death benefit which under the arrangement with Donovan was a fraud upon their rights. The case of *Kerr v. Crane*, *ubi supra*, is not fully reported; for some of the facts to which we have referred above resort must be had to the original papers.

The finding of the judge "that said O'Brien had no intent to evade the laws of the Commonwealth or the constitution and by-

laws of the defendant corporation, and that in making said designation he acted under advice of counsel," is of no consequence. His act was an evasion of the laws of the Commonwealth and of the constitution and by-laws of the defendant corporation. The fact that counsel wrongly advised him to the contrary and the fact that he believed that counsel's advice was right did not change the character of the designation or appointment made by him. See in this connection *Ulman v. Ritter*, 72 Fed. Rep. 1,000; *Rodgers v. Pitt*, 89 Fed. Rep. 424; *Royal Trust Co. v. Washburn, Bayfield & Iron River Railway*, 113 Fed. Rep. 531; *Green v. Griffin*, 95 N. C. 50; *McKillop v. Taylor*, 10 C. E. Green, 139. The second, third and ninth rulings asked for should have been given and the exceptions must be sustained.

It appears from the bill of exceptions that the findings which have been made dispose of the whole controversy. We are therefore of opinion that acting under St. 1913, c. 716, § 3, we should now direct that a final decree be entered. It has been agreed among the parties that the \$1,000 (the amount of the death benefit certificate) should be paid without costs or interest and that the defendant corporation should not claim its costs. The decree to be entered should declare that no legal designation in favor of his creditors was made by the deceased during his lifetime and should direct the defendant corporation to pay the \$1,000 to the plaintiffs. It is

So ordered.

MEMORANDUM.

On the fourth day of January, 1915, the Honorable Henry Newton Sheldon resigned the office of a Justice of this court, which he had held since the eighteenth day of October, 1905.

SECURITY BANK OF NEW YORK vs. FRANK J. CALLAHAN
& another.

Suffolk. November 11, 1914. — January 6, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Equity Jurisdiction, To enforce assignment of interest in estate of decedent, For an accounting. Executor and Administrator. Judgment. Probate Court, Decree.

If a debtor assigns to his creditor an interest as legatee under a will "up to the" amount of the debt as security for the payment of the debt, and the creditor gives notice of the assignment to the executor of the will, who assents to it and signifies his willingness to regard the creditor as the holder of a partial assignment of the interest of the debtor in the estate, and if thereafter the executor in a final settlement of the estate ignores the creditor and pays to the debtor or for his benefit the whole amount of his legacy which is in excess of the creditor's claim and files in the Probate Court his final account showing such payment, and a decree is entered allowing the account from which no appeal is taken, the creditor may maintain a suit in equity to compel the executor to account to him for the amount covered by the assignment.

A decree of the Probate Court allowing a final account of an executor of a will showing payments by him to a legatee is no bar to a suit in equity by a creditor of the legatee to compel the executor to account to him for the amount of a partial assignment of the legacy of which the executor had notice and to which he assented before he made any payment to the legatee.

BILL IN EQUITY, filed in the Supreme Judicial Court on August 30, 1913, and afterwards amended, against Frank J. Callahan and George A. Callahan, in which it was alleged in substance that the plaintiff was the successor of the Fourteenth Street Bank of New York City, to whom on or about March 2, 1908, there were owing the principal, interest and protest fees of two one thousand dollar notes of the defendant George A. Callahan; that on that day the defendant George A. Callahan executed and delivered to the plaintiff's predecessor in title the assignment hereinafter set out of his interest in the estate of John F. Callahan as security for the payment of the notes, the estate then being in process of liquidation and settlement; that shortly after that date the defendant Frank J. Callahan was informed and notified of the assignment, and that on May 27, 1908, he was notified formally, as executor, in writing, and that at the times when he received

notice of the assignment he had in his possession and control as executor property sufficient in amount so that the claims of the plaintiff easily might have been paid out of the share of George A. Callahan.

It further was alleged in the bill that the defendant Frank J. Callahan never refused to recognize the assignment, but communicated with the plaintiff from time to time with reference to the progress of the settlement of the estate and the prospects for the payment by the executor of the interest and share of George A. Callahan under the will; that in various ways the defendant Frank J. Callahan signified to the plaintiff his assent to the assignment and his willingness to treat the plaintiff as the holder of a partial assignment of the interest of George A. Callahan; that the plaintiff inquired of the defendant Frank J. Callahan from time to time as to what the prospects were of a settlement and distribution of the estate being made, and the interest of George A. Callahan thereunder being paid and liquidated, and received assurances from the defendant Frank J. Callahan that the matter was being attended to as rapidly as could be done under the circumstances, and that funds amounting to at least the amount of the claim of the plaintiff still remained in the hands of the defendant Frank J. Callahan for account of the interest and share of George A. Callahan under the will; that while the plaintiff was lulled into security by the before mentioned representations of the defendant Frank J. Callahan, and after that defendant had received notice of the assignment, Frank J. Callahan, without the knowledge of the plaintiff, paid out to and for the account of the defendant George A. Callahan all of his share and interest in the estate, the amounts so paid being largely in excess of the claim secured by the assignment; that thereafter Frank J. Callahan presented his accounts as executor to the Probate Court for allowance, showing that all of the assets of the estate had been paid out and distributed by the executor; that on June 12, 1913, a decree was made by the Probate Court allowing the final account of the executor, from which no appeal was taken.

The prayers of the bill were for an adjudication that the defendant George A. Callahan owed the plaintiff the amount of the notes with interest and protest fees, that the assignment was

valid and effectual to substitute the plaintiff for George A. Callahan as to his share in the estate of John F. Callahan to the amount of its claim, that the defendant Frank J. Callahan might "be required to account with the plaintiff, and to disclose the condition of the accounts of the estate of John F. Callahan in his hands on March 2, 1908, and to disclose all of his dealings with the assets of said estate from that time to the date of the filing of this bill, for the purpose of ascertaining the amount and value of the interest of George A. Callahan in the assets of the estate of the said John F. Callahan on March 2, 1908, and thereafter," and that, if upon such accounting it should appear that George A. Callahan had any interest of value in the assets of the estate of John F. Callahan, deceased, on March 2, 1908, or thereafter, the defendant Frank J. Callahan might be ordered to pay to the plaintiff the amount of that interest up to the amount of the claim of the plaintiff.

Material portions of the assignment, which was signed and acknowledged by George A. Callahan before a notary public, were as follows:

"For and in consideration of One Dollar (\$1.00) to me in hand paid by the Fourteenth Street Bank in the City of New York, State of New York, the receipt of which is hereby acknowledged by the execution and delivery of these presents, and for other valuable consideration, I do hereby assign to said bank, as security for the payment of the following notes made by me: [describing them] all my right, title and interest in and to my share of the Estate of John F. Callahan, deceased, up to the sum of Two Thousand Dollars (\$2,000) and interest . . . up to the date of the liquidation of my debt to said bank as evidenced by the two above-named notes of mine held by it."

The defendant Frank J. Callahan demurred to the bill, assigning the following grounds of demurrer:

"1. That it does not set forth facts which would entitle the plaintiff to any relief as against this defendant.

"2. That it fails to show any adjudication by the Probate Court to the effect that George A. Callahan was or is entitled to any payments from the estate of John F. Callahan or from his executor.

"3. That the bill states that a final account has been allowed by

the Probate Court, but does not state that any sum was found to be due George A. Callahan upon such final account.

"4. The bill did not allege that the accounts of Frank J. Callahan, executor of the estate of John F. Callahan, as allowed by the Probate Court, show that any payment was made to George A. Callahan by Frank J. Callahan as executor after May 27, 1908, the date on which it is alleged that notice of the assignment of George A. Callahan to the plaintiff was given to Frank J. Callahan.

"5. That it fails to show that there has ever been any decree of distribution made by the Probate Court in connection with the will or estate of John F. Callahan.

"6. That it fails to allege that at the final accounting George A. Callahan was or is or has ever been entitled to any balance or any payment from Frank J. Callahan, executor.

"7. That it shows that the rights of the plaintiff, if any he has, should have been first asserted in the Probate Court."

The case was reserved by *De Courcy, J.*, for determination by this court upon the bill as amended and the demurrer of Frank J. Callahan.

T. Hunt, for the defendant Frank J. Callahan.

R. E. Goodwin, for the plaintiff.

BRALEY, J. While at common law not only the subject matter must be in existence and in the actual or potential possession of the assignor, but partial assignments are not recognized, a court of equity will protect and enforce such assignments by beneficiaries under trusts where the right has not been cut off by the testator, and by heirs and legatees of their contingent interest in funds or property, if made in good faith for a valuable consideration, and not contrary to public policy. *Low v. Pew*, 108 Mass. 347, 350. *Leverett v. Barnwell*, 214 Mass. 105. *Trull v. Eastman*, 3 Met. 121. *Jenkins v. Stetson*, 9 Allen, 128. *Whipple v. Fairchild*, 139 Mass. 262. *James v. Newton*, 142 Mass. 366. *Wainwright v. Sawyer*, 150 Mass. 168. *Sawyer v. Cook*, 188 Mass. 163. *Hinkle v. Wanzer*, 17 How. 353. *Delaware County Commissioners v. Diebold Safe & Lock Co.* 133 U. S. 473. *Row v. Dawson*, 1 Ves. Sen. 331.

The assignment held by the plaintiff as collateral security for the payment of certain promissory notes of the assignor clearly comes within this principle. It transferred as between the parties

a qualified interest commensurate with the amount of the loans and accrued interest in the share of the estate bequeathed to the assignor. *James v. Newton*, 142 Mass. 366. *Richardson v. White*, 167 Mass. 58. The bill does not refer to the provisions of the will. It alleges only that the assignor is a "beneficiary" having an unqualified interest or share which we assume to be that of a legatee. The executor in the settlement of the estate would have the right to deal with the legacy as an entirety until informed of the transfer to which it is alleged he consented and expressed his willingness to treat the plaintiff as the assignee.

If for his own protection the plaintiff gave notice of the assignment, the assent or acceptance by the debtor would add nothing to the bank's title. *Buttrick Lumber Co. v. Collins*, 202 Mass. 413. *Kingman v. Perkins*, 105 Mass. 111. But as the demurrer admits all the essential allegations, the question referred to but left undecided in *James v. Newton*, 142 Mass. 366, and *Richardson v. White*, 167 Mass. 58, whether in the absence of such assent the executor could have ignored the plaintiff and dealt only with the legatee, need not be decided.

It is admitted that the executor, after receiving notice, paid to the assignor or on his account all of his share, which was largely in excess of the plaintiff's demands, and having presented his accounts to the court of probate, the final account showing the distribution has been allowed, and no appeal from the decree has been taken. The demurrant and executor contends that this decree bars relief.

It is immaterial whether the amount coming to the assignor was paid before or after the estate had been settled. The allowance of the final account under R. L. c. 150, §§ 1, 2, which must be presumed to have rested upon the preceding accounts, closed the estate as effectually as if a decree of distribution had been asked for and entered under § 19. *Rhines v. Wentworth*, 209 Mass. 585, 588, and cases cited. *Welch v. Boston*, 211 Mass. 178, 182. The court of probate in a decree of distribution deals only with heirs and legatees, without regard to their assignments or pledges. *Lenz v. Prescott*, 144 Mass. 505, 515. *Coram v. Davis*, 209 Mass. 227. It is only where the administrator or executor states in his account that payments to heirs or legatees are claimed because of payment to their assignees, that the validity or effect of an as-

signment can be determined in that court. *Palmer v. Whitney*, 166 Mass. 306. *Robbins v. Horgan*, 192 Mass. 443.

The rights of the plaintiff therefore are not foreclosed by the decree. *Abbott v. Foote*, 146 Mass. 333. *Shores v. Hooper*, 153 Mass. 228. *Minot v. Purrington*, 190 Mass. 336, 341. And this court having acquired jurisdiction can determine all questions within the frame of the bill which are necessary to afford the plaintiff full equitable relief. *Perry v. Pye*, 215 Mass. 403, 413. *James v. Newton*, 142 Mass. 366. *Fourth Street Bank v. Yardley*, 165 U. S. 634.

The payment of debts and charges of administration do not appear to have so depleted the personal estate as to require contribution by the legatee, and the entire legacy was due and payable at the date of the final account. *Fitch v. Randall*, 163 Mass. 381. It having been the duty of the executor to deduct and transmit to the plaintiff a sufficient amount to satisfy its demands, the payments made before stand the same in legal intendment as if made after the decree had been entered. *Osborne v. Jordan*, 3 Gray, 277. *Robbins v. Horgan*, 192 Mass. 443, 447. If the legatee had interposed objections or questioned the effect of the assignment, the executor, who was a mere stakeholder, could have compelled the claimants to have litigated their rights on a bill of interpleader. *Morse v. Stearns*, 131 Mass. 389. Or if the executor had refused to recognize the assignment the plaintiff could have protected its rights by a bill for injunctive relief as in *Lenz v. Prescott*, 144 Mass. 505.

But on the face of the record, having voluntarily paid after notice and assent the legacy either to the assignor or for his benefit, he must account to the plaintiff for the amount covered by the assignment. *Newcomb v. Williams*, 9 Met. 525, 535. *Buttrick Lumber Co. v. Collins*, 202 Mass. 413, 421, 422. *Gardiner v. Thorndike*, 183 Mass. 81.

We are not called upon to determine whether under *Cleveland v. Draper*, 194 Mass. 118, if the payments were mistakenly made in good faith he can petition the court of probate to have the decree revised, and if revision is decreed the assignor can be compelled to refund.

The result is that the demurrer must be overruled.

Decree accordingly.

TIMOTHY C. LEAHY, administrator, vs. STANDARD OIL COMPANY
OF NEW YORK.

Hampshire. September 15, 1914. — January 7, 1915.

Present: RUGG, C. J., LORING, DE COURCY, & CROSBY, JJ.

Negligence, In use of gasoline, Causing death. Joint Tortfeasors. Evidence, To show degree of culpability in action for causing death.

If, as the natural and proximate result of negligence of an employee of a dealer in gasoline, gasoline is collected in a pit in a certain cellar where it remains, covered, until six weeks later, when, through negligence of an occupant of the cellar who knew of its presence, a large quantity of water is permitted to flow into the pit causing the gasoline to flow out upon the cellar bottom and gas generated by it to escape so that, when an employee of the occupant opened the door of a furnace in the cellar, explosions occurred which caused the employee's death, an action may be maintained by the administrator of the estate of the employee against the dealer in gasoline to recover for the conscious suffering and death of his intestate; and where at the trial of such an action the judge refuses to rule that, if the negligence of the defendant's employee and of the employer of the plaintiff's intestate were contributory proximate causes of the accident, the plaintiff is entitled to a verdict, and instead leaves it to the jury to determine which of the two was the cause of the accident, exceptions to such rulings must be sustained.

At the trial of an action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, by the administrator of one whose death was alleged to have been caused by negligence of an employee of the defendant in sweeping gasoline into a pit in a cellar, evidence is admissible, as bearing on the degree of culpability of the defendant's employee, to show that the employee stubbornly persisted in so disposing of the gasoline although persons standing by at the time told him that he should not do so and suggested to him a proper way in which to dispose of it.

TORT by the administrator of the estate of John O'Rourke to recover for the conscious suffering and death of the intestate alleged to have been caused on March 4, 1913, by an explosion of gas generated from gasoline negligently left by an employee of the defendant in a pit in a basement which afterwards was occupied by the plaintiff's employer as the "Draper Garage" in Northampton. Writ dated July 18, 1913.

In the Superior Court the case was tried before *King, J.* The evidence and material exceptions are described in the opinion.

There was a verdict for the defendant; and the plaintiff alleged exceptions.

J. C. Hammond, (*W. J. Reilley* with him,) for the plaintiff.

H. Parker, for the defendant.

LORING, J. The plaintiff's intestate, O'Rourke by name, was injured by an explosion of gasoline in the boiler room of a garage in which he was employed, and, after conscious suffering, died as the result of the accident. The garage was owned by the plaintiff's employer, Sullivan by name. The accident happened on March 4, 1913. About six weeks before that (on January 25, 1913) one Morton (an employee of the defendant company) undertook to fill the gasoline tank of the garage. While he was doing so "he was informed by one Dalton, a plumber's helper who was working in the cellar, that the gasoline was flowing into the cellar." The cellar referred to by Dalton was an addition to Sullivan's garage which then was being constructed, not by Sullivan, but by the owner of the garage for Sullivan's use when completed. The cellar or addition was being built for a new steam heating plant for the garage. On the day in question (January 25, 1913), steam fitters, plumbers and electricians employed by the owner, not by Sullivan, were at work in the cellar. In the middle of the cellar floor there was a pit to receive water which might come from the floor of the cellar or from the soil underneath the floor, and was about three feet square and two and a half feet deep. It had no outlet, but there was an "automatic arrangement" for pumping it out when the liquid in it was more than seven inches deep. When the liquid in the pit was seven inches deep the pit held about thirty-three gallons.

The reason for the gasoline flowing into the cellar was Morton's failure to insert the funnel (through which he was pouring the gasoline) into the filler pipe or the mouth of the tank of the garage which held the gasoline. Forty-five gallons of gasoline were in this way spilled upon the cellar floor (as we understand the bill of exceptions), and five gallons went into the tank. Upon being told by Dalton (the plumber's helper) that "gasoline was flowing into the cellar," Morton "took a broom, went down to the cellar and swept the gasoline into the pit. . . . Morton then went upstairs, . . . where he received a check from Sullivan in payment for the gasoline which he had put into the tank." Morton at this

time said to Sullivan that he had forty-five gallons of gasoline to pay for himself, and on being asked how that happened he answered: "I didn't put the funnel in the filler pipe." While Morton was being paid by Sullivan, "one Dunn, a plumber, who was employed on the boiler, but was upstairs when the gasoline was spilled, had caused the doors [of the cellar] to be nailed up." The doors were nailed up as a matter of safety because of the gasoline spilled upon the cellar floor. "The doors remained nailed for some three or four days, when the plumbers, steam fitters and electricians went to work in the cellar and worked with torches and candles around the floor." Sullivan testified that on January 25 he did not go into the cellar (which confessedly was not then in his control), that he was told that "there was gasoline in the cellar" at that time but that he did not know that the gasoline had been swept into the pit.

The addition to the garage was turned over to Sullivan on February 1, "with the fire going" in the heating plant. On February 7 or 14 the plaintiff's intestate, O'Rourke, entered Sullivan's employ. O'Rourke was employed (among other things) to wash cars, to stay at the garage in the evening, and to "fix up the fires when he was leaving to go home." On the evening of March 4, 1913, Sullivan left the garage between six and seven o'clock, leaving O'Rourke in charge. O'Rourke, having occasion to get some warm water to wash a car, went down the stairs to the boiler room and drew off some water from the boiler. This was in accordance with the practice in use at the garage. Seeing that the water in the boiler was too low, he opened the feed valve but did not turn it off because he did not know how to do that. Sullivan returned to the garage later in the evening and was told by O'Rourke that he had turned the water on to the boiler and did not know how to shut it off. Sullivan thereupon went down into the cellar and turned the valve from the feed pipe into the boiler. Finding that the boiler was too full, he opened the cock and let the surplus water in the boiler run on to the cellar floor. As he reached the top of the stairs after doing this, he met O'Rourke, who said that he was going down to put on some coal for the night. For this purpose O'Rourke opened the door of the fire box. Thereupon three explosions occurred, causing the injury here complained of.

An expert testified in substance that the gasoline would remain on the surface of the water and the gasoline vapor (being heavier than air) would stay in the pit "provided the cover of the pit were not removed;" that so long as the vapor remained in the pit there would be no explosion; that the explosion was due to the "water that overflowed the basin;" that the gasoline, being lighter than water, then flowed out of the pit over the floor; that a vaporization of the gasoline ensued and, the vapor coming in contact with the fire, the explosion occurred. He further testified that sweeping the gasoline into the pit was "a very unsafe way" of disposing of it; that if the door of the fire box were opened (while there was a fire in the box) the raising of the diluted gasoline in the pit would be sufficient to cause an explosion.

It is to be inferred from what is stated in the bill of exceptions that when the steam fitters, plumbers and electricians went to work in the cellar with torches and candles three or four days after January 25, there was a cover on the pit. Apart from the testimony of the expert, the only references in the bill of exceptions to a cover of the pit are to be found (1) in Sullivan's testimony. He testified that: "After the 25th day of January up to the 4th of March, the fires were not going into [in] the boiler. The cover was not removed from that pit any time during that period." There is a patent mistake in the testimony. It expressly appears in the bill of exceptions that there was no fire in the boiler on the twenty-fifth of January; it also expressly appears that when possession of the addition was given to Sullivan on February 1, there was a fire in the boiler and that thereafter a fire was kept in the boiler until the fourth of March. The only other reference to a cover of the pit is the reference to it in the testimony of the expert. In giving his testimony the expert said: "We have here a pit with a cover, but the question is whether that cover is on or off at the time these candles are brought near"; and the judge told the expert that he had the right to incorporate that in his answer. Whether the cover was a wooden cover and was floated off by the diluted water and gasoline which Sullivan ran out upon the floor when he undertook to reduce the amount of water in the boiler, or whether it was an iron cover with holes in it through which the diluted water and gasoline ran on to the floor when the pit overflowed, does not appear.

By his sixth, eighth, twelfth and fifteenth requests for rulings * the plaintiff (in effect) asked the judge to rule that if the negligence of Sullivan and the negligence of Morton (if both were found to have been negligent) were contributing proximate causes of the accident, the plaintiff was entitled to a verdict. But in place of doing so the judge left it to the jury to decide which of the two was the cause of the accident. The charge was wrong. That is established by the decision in *Burke v. Hodge*, 217 Mass. 182, and cases cited. To avoid a possible misapprehension we add that of course the rule in the case of actions for defects in highways is different. See for example *Clinton v. Revere*, 195 Mass. 151, 154.

The defendant has undertaken to support the charge of the judge on the ground that in the case at bar one only of the persons who were guilty of concurrent negligence had been sued. There is nothing in that contention. If on the facts the plaintiff had a several right of action against Sullivan and also a several right of action against the defendant the fact that he chose to enforce one or both does not affect the question of what facts he must prove to make out each case.

In addition there are two exceptions to the exclusion of evi-

* "6. The test is to be found not in the number of intervening events or agencies, but in the character, and in the natural and probable connection between the wrongdoer and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues."

"8. If two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable."

"12. In the practical furtherance of justice, it is a principle of the law of torts, that where two or more wrongdoers injure another in person or property by their several acts, all of which are concurrent, and contribute to one wrong, but which might have been caused by each, then if upon the evidence no distinction can be drawn between their acts, they are all jointly and severally liable."

"15. If the jury find that Sullivan was negligent in running the water into the pit, then the negligence of Sullivan and the negligence of the defendant were concurrent in their operation to produce the injury and this does not relieve the defendant of liability."

dence which must be sustained. The plaintiff offered to show that when Morton took the broom to sweep into the pit the gasoline which he had spilled on the cellar floor, an employee of the defendant said to him, "You should take a pail and sponge and sop it up," and that Morton answered: "To Hell with it." Further, that "while Morton was sweeping the gasoline into the pit, Dalton, a plumber's helper, told him he didn't think it was right to put it in there;" and that Morton replied, "Oh, it is all right, I am going to put it in there." The first count is brought to recover a fine for negligently causing the death of O'Rourke. By the terms of the act under which it is brought (R. L. c. 171, § 2, amended by St. 1907, c. 375), the amount of the fine depends upon the degree of the culpability of the defendant or of his servant. Where a defendant or his servant persists in his negligence after he is warned against it, the degree of culpability is (or may be found to be) greater than it is in a case where no warning is given. The evidence excluded was admissible on the degree of Morton's culpability. If the verdict for the defendant had stood these exceptions would not have been sustained; for in that event the evidence would have been rendered immaterial. But since the case is to go back for a new trial these exceptions must be sustained.

We have sustained the plaintiff's exception to the charge so far as it was inconsistent with the sixth, eighth, twelfth and fifteenth rulings asked for on the ground that in respect to the matter stated above the charge was wrong. We do not decide that those rulings are in all respects an accurate statement of the law which is to govern the new trial.

Exceptions sustained.

EDWARD THOMPSON COMPANY vs. H. MURRAY PAKULSKI.

Suffolk. November 17, 1914. — January 7, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Contract, Validity, Performance and breach. Sale.

If, at the trial before a judge without a jury of an action for a balance alleged to be due upon the purchase price of certain books, where the defendant contended that the contract of sale was illegal because the plaintiff in publishing the books had infringed upon the copyright held by another publisher, and that they were published in violation of the copyright laws of the United States, the judge finds that the plaintiff had been guilty of such an infringement and violation but refuses to rule that the contract between the plaintiff and the defendant was illegal and finds for the plaintiff, the finding will not be disturbed if it appears that the defendant has not been disturbed in his possession of the books and that, after the sale of the books to the defendant, the owner of the infringed copyright brought a suit for such infringement in a United States court against the plaintiff in this action, and that by agreement and stipulation of the parties to that action a final decree was entered in that suit whereby the plaintiff in this action was absolved upon payment of costs of suit from all liability for the infringement to the owner of the copyright.

CONTRACT, for a balance alleged to be due upon the purchase price of certain law books sold by the plaintiff to the defendant. Writ in the Municipal Court of the City of Boston dated July 1, 1912.

The defendant in an amended answer alleged that the contract of sale was illegal and that there had been a failure of consideration, and in a declaration in set-off claimed the sum of \$97.50 which he had paid on account of the purchase price of the books.

On appeal to the Superior Court the case was heard by *Bell, J.*, without a jury. The defendant relied upon his answer of illegality, based upon the ground that the American and English Encyclopaedia of Law, second edition, which the plaintiff had sold to him, was an infringement of the works of the West Publishing Company and was printed and published in violation of the copyright laws of the United States.

By agreement of counsel, the case of *West Publishing Co. v. Edward Thompson Co.* 184 Fed. Rep. 749, was offered and admitted as evidence, from which the judge "was to consider the

facts, findings and decree therein set forth so far as material." The defendant also offered in evidence a certified copy of stipulations, agreement of parties and decree entered in that action, from which it appeared by the decree itself that the West Publishing Company and the Edward Thompson Company had entered into an agreement of compromise and settlement whereby it was provided that the defendant's liability for its infringement should be discharged and satisfied, the defendant paying costs. The suit of *West Publishing Co. v. Edward Thompson Co.* and the agreement referred to were subsequent to the sale to the defendant in this case.

The defendant offered evidence tending to show that he had offered to return the books to the plaintiff before this action was brought.

The defendant asked for the following rulings:

"1. On all the evidence the court must find that the books sold by the plaintiff to the defendant and for the purchase price of which this action is brought were an infringement of the copyrights of the West Publishing Company.

"2. Upon all the evidence the court must find that the plaintiff's declaration is based upon a claim for the purchase price of books which were printed and published by the plaintiff contrary and in violation of the copyright laws of the United States.

"3. Upon all the evidence the contract made by the plaintiff and the defendant for sale and purchase of the American and English Encyclopaedia of Law (first and second edition) was illegal and the Court will not enforce it and there must be a verdict for the defendant.

"4. Upon all the evidence the contract made by the plaintiff and the defendant was void for illegality upon the part of the plaintiff and judgment must be for the defendant.

"5. Upon all the evidence the contract made by the plaintiff and the defendant was void for illegality upon the part of the plaintiff and the defendant is entitled to judgment for payments made by him under the contract.

"6. Upon all the evidence judgment must be entered for the defendant.

"7. Upon all the evidence there must be judgment entered for the defendant on his declaration in set off.

"8. Upon all the evidence the plaintiff has put it out of his power to complete the sale of the American and English Encyclopaedia of Law, by giving title to the defendant and therefore the consideration of the contract has failed.

"9. The sale of an article which is an infringement of a copyright, secured by a third person, is illegal and therefore void."

The judge gave the first and second rulings, refused the others, and found for the plaintiff in the sum of \$208. The defendant alleged exceptions.

W. Hartstone, for the defendant.

P. Glunts, for the plaintiff.

CROSBY, J. This is an action of contract on an account annexed to recover a balance claimed to be due for books sold and delivered.

Aside from two volumes, the books so sold and delivered consisted of the second edition of the American and English Encyclopaedia of Law. The sale was made in 1908, and the defendant admits that he received the books; it also appears that he has made certain payments on the purchase price.

The only question presented is whether the defendant is relieved from liability upon his contract by reason of the decision in the case of *West Publishing Co. v. Edward Thompson Co.* 184 Fed. Rep. 749. The bill of exceptions recites that it was agreed by counsel that this case "was offered and admitted as evidence, from which the court was to consider the facts, findings and decree therein set forth so far as material."

At the trial before a judge of the Superior Court without a jury it further appeared that "the defendant also offered in evidence a certified copy in due form of stipulations, agreement of parties and decree entered in said action of *West Publishing Co. v. Edward Thompson Co.* in support of his defence of illegality."

The suit brought by the West Publishing Company against the defendant (the plaintiff in this case) arose out of the alleged infringement by the defendant of the plaintiff's copyright in the printing and sale of the American and English Encyclopaedia of Law, second edition.

By reason of the first and second rulings made by the presiding judge, it must be assumed that the books printed and sold by the plaintiff to the defendant were an infringement of the copyrights of the West Publishing Company, and in violation of the copy-

right laws of the United States. Under the decree entered in the above mentioned case it is recited that the parties "had entered into an agreement of compromise and settlement whereby it was provided that the defendant's liability for its said infringement . . . shall be discharged and satisfied, the defendant paying costs, and the decree was in accordance with this settlement." This suit was brought and the agreement referred to was subsequent to the sale to the defendant in this case.

The decree above referred to does not expressly mention the contracts entered into by the defendant for the sale of the American and English Encyclopaedia of Law, second edition. The effect of the decree, however, was to compromise and settle all liability of the defendant (the plaintiff in this case) for the infringement. *Consumers' Gas Co. of Danville v. American Electric Construction Co. Ltd.* 50 Fed. Rep. 778, 780.

As the terms of the stipulations and agreement of parties which were in evidence before the judge of the Superior Court are not before us, we cannot say that under the decree and the other evidence the court was not warranted in finding for the plaintiff. He may have found that the settlement between the parties under the decree and agreements entered into by them gave the Edward Thompson Company the right to have the benefit of contracts for the sale of books previously entered into by it. If so, the West Publishing Company could have been found to have ratified and confirmed such contracts.

The defendant in the case at bar has not been disturbed in his physical possession of the books, and in view of the finding of the judge of the Superior Court we see no reason why he should not pay the balance due in accordance with the terms of the contract. See *Potterton v. Condit*, 218 Mass. 216; *Standard Button Fastening Co. v. Harney*, 155 Mass. 507; *Standard Button Fastening Co. v. Ellis*, 159 Mass. 448.

It follows that none of the requests which were refused could have been given.

Exceptions overruled.

LILLIAN B. OGDEN vs. WILLIAM H. ASPINWALL & others,
trustees.

Suffolk. November 17, 18, 1914. — January 7, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Practice, Civil, Exceptions, Setting aside verdict. Negligence, Probable consequences, In operation of elevator. Elevator. Landlord and Tenant. Damages, Excessive. Words, "Objected," "Commensurate."

Statements in a bill of exceptions that the excepting party "objected" to the refusal of the presiding judge to make certain rulings and that such party "objected" to certain portions of the judge's charge, do not state exceptions; but, in the present case in which this point was not taken by the adverse party, this court assumed for the purposes of decision that the objections were before them as exceptions, and as exceptions they were overruled.

In this Commonwealth it long has been settled law that in an action of tort for personal injuries it is not necessary, in order to hold the defendant liable, for the plaintiff to prove that the particular series of events that resulted in the plaintiff's injuries were the probable consequences of the defendant's negligence; it is enough for the plaintiff to show that the probable consequence of the defendant's conduct was that harm of the same general character as that which came to the plaintiff would come to persons who stood in the same general relation to the defendant that the plaintiff did.

In an action against the owner of a building, who maintained and operated therein an elevator used for the transportation of both freight and passengers, brought by a person having the rights of a tenant in the building, for personal injuries from the elevator suddenly starting downward as the plaintiff was stepping out of it at a floor where it had stopped, there was evidence on which it could have been found that the metal grill work, which made the front of the car when it was used for passengers, was removable, and was taken out when the car was used for freight, that the bolts by which this grill work was fastened to the car had become defective and that during the six weeks preceding the accident the existence of a defect in the grill work twice had been reported to the defendant but that nothing had been done in consequence of those reports, that at the time of the accident the elevator boy was pushing open the sliding door which formed a part of the grill work, when the whole grill work fell in on the boy, causing him involuntarily to pull the lever toward him and start the elevator downward, whereby the plaintiff was injured. *Held*, that there was evidence of the defendant's negligence on which the plaintiff was entitled to go to the jury.

In an action of tort for personal injuries caused by the sudden starting downward of an elevator as the plaintiff was stepping out of it on a floor of the defendant's building, there is no error in an instruction of the presiding judge to the jury, in relation to the defendant's duty in the maintenance and operation of the elevator, that "due care to be exercised by anybody must be commensurate

care. It must be the care which is equal and proportionate to the probable harmful consequences that may follow from the lack of its exercise;" the meaning of the word "commensurate" being explained by the other words of the passage quoted and its use in this sense being in accordance with its approval and use in previous decisions of this court.

On an exception to the refusal of a judge, who presided at the trial of an action of tort for personal injuries, to set aside a verdict for the plaintiff on the ground that the damages were excessive, the question for this court is whether the judge in denying the motion abused his discretion, and to sustain the exception it is necessary to decide that the judge could not have taken honestly the view taken by him.

LORING, J. The facts out of which this action arose were, or could have been found by the jury to have been, in substance as follows: The plaintiff was an employee of a tenant of the defendants and as such had a right to use the elevator which the defendants had provided for the use of their tenants. As she was in the act of stepping out of it, the car suddenly, without warning, went from under her. She tried to step back into the car but was caught, as it went down, between the top of the car and the floor of the building.

The elevator was used for both freight and passengers. When used for freight, the metal grill work which made the front of the car was taken out. When used for passengers, part of this grill work was stationary and the rest made the door of the elevator. That part of the grill work which made the door was on the left of the car when facing outward. The elevator was operated by a lever also on the left hand side of the car. The elevator boy held the lever in his left hand and used his right hand to open and shut the door, which slid back and forward just outside the stationary part of the grill work. To send the car up, the lever was moved forward toward the front of the car; to send the car down, it was moved back in the opposite direction. When the lever was in the centre the car was stationary. Attached to the lever was a clutch in which there was a spring called a dog and grip.

The stationary part of the grill work was attached to the elevator car at the top by "two stationary pins which fitted into holes in the frame of the elevator." At the bottom it was intended to be bolted to the car, but (on the evidence) in place of bolts "old rusty spikes, wire spikes, . . . badly bent" had been used. For about six weeks before the accident the condition was described by the elevator boy as follows: "The holes in the floor

must have been three-quarters of an inch, the way they were worn, and as they cleaned the car every morning, the dirt seemed to all gather up in under that loose frame, under that loose piece of grating, and those holes were more or less full of dirt, and the bolt didn't seem to have the grip that it ought to have on the floor, on account of the dirt underneath." The result was that the door had become loose and "seemed to wobble." During the six weeks next before the accident the car twice had been reported as out of order, but nothing had been done by the defendants in consequence of these reports.

At the time of the accident here in question, the elevator boy threw back the door with his right hand when the car reached the street floor. But the door did not go back into its place by some six inches. To get the elevator door entirely open the boy pushed it back harder with his right hand, having the end of the lever in his left hand. Thereupon the whole grill work (including the stationary part and the sliding door) fell in on top of the boy, causing him involuntarily to pull the lever toward him. In consequence the car went down, and the plaintiff was caught as stated above. As soon as the elevator boy recovered from his surprise he reversed the lever, the car went up, and the plaintiff was released.

At the trial the defendants asked for five rulings, set forth in the note: *

It is stated in the bill of exceptions that the defendants "ob-

* "1. Upon all the evidence in the case the plaintiff cannot recover.

"2. The starting of the car under the circumstances of this case is not an act for which the defendants were responsible.

"3. The starting of the car and the injury to the plaintiff which resulted therefrom were not consequences which according to the usual experience of mankind were probable or likely to occur from allowing the movable frame to be in the condition that it was at the time of the accident.

"4. Even if it is found that the defendants were negligent in allowing the movable frame to be in the condition that it was at the time of the accident, and that in consequence thereof the frame fell upon the elevator operator causing him to push the lever and start the car, thereby causing the plaintiff's injuries, the plaintiff cannot recover.

"5. The act of the elevator boy in releasing the clutch and throwing the lever over was not an act which could reasonably be anticipated as the result of the falling of the movable frame, and the defendants are not liable."

jected" to the refusal of the presiding judge to give the rulings asked for, and that they "objected" to portions of the charge given by the presiding judge. An objection is not an exception, and this part of the bill of exceptions might be passed over for that reason. But the point has not been taken by the plaintiff. There is nothing in these "objections," and we prefer to put our decision on that ground.

The defendants have argued that on the statement (contained in the bill of exceptions) of the way in which the stationary part of the grill work was attached to the top of the car, the grill work must have fallen outward and could not have fallen inward on top of the elevator boy. In view of the fact that several witnesses testified directly to the fact that the grill work (including the stationary part and the door) did fall in on top of the elevator boy, and that one of the witnesses had to hold it up to enable the elevator boy to work the lever, it is idle to make this contention.

The main contention made by the defendants underlies the second and third rulings asked for by them and is in terms expressed in the fifth. It is that to hold the defendants liable the plaintiff must prove that the particular series of events which ended in the injury done the plaintiff were the probable consequences of the defendants' acts. But it has been settled for more than forty years that that it is not the law of the Commonwealth. *Higgins v. Dewey*, 107 Mass. 494. *Hill v. Winsor*, 118 Mass. 251. *Hollidge v. Duncan*, 199 Mass. 121. *Dulligan v. Barber Asphalt Paving Co.* 201 Mass. 227; and in this connection see *McNicholas v. New England Telephone & Telegraph Co.* 196 Mass. 138, 141; *Delaney v. Framingham Gas, Fuel & Power Co.* 202 Mass. 359. It was settled by the case of *Higgins v. Dewey*, *ubi supra*, and the other cases just cited, that to make out liability on the part of a defendant it is enough to prove that the probable consequence of his acts was that harm of the same general character as that which came to the plaintiff would come to persons who stood in the same general relation to the defendant as the plaintiff; and that it is not necessary to make out liability on a defendant's part that the particular series of events which ended in the injury to the plaintiff were the probable consequences of the defendant's acts. For a discussion of the question and a collection

of cases outside the Commonwealth see Professor Smith in 25 Harv. Law Rev. 238 *et seq.*

In the case at bar the jury were warranted in finding that the action of the elevator boy in squeezing the clutch and pulling the lever toward him, thereby causing the car to descend, was an involuntary action on his part caused by the front of the car falling in on him. If so, there was in this case no intermediate act of a third person who was found, or might have been found, to have been the cause or one of the causes of the accident, as was the case in *Gibson v. International Trust Co.* 177 Mass. 100; *S. C.* 186 Mass. 454; and in the cases of *Lane v. Atlantic Works*, 111 Mass. 136, and *Horan v. Watertown*, 217 Mass. 185.

In addition to the "objections" taken to the refusal to give the rulings asked for, the defendants objected to the charge given by the presiding judge in the particulars stated in the note.*

It might be held that the objections to the charge were too indefinite to be the ground of an exception. But we pass by that. There is nothing in the "objection."

In his charge to the jury the presiding judge said: "Now due care to be exercised by anybody must be commensurate care.

* "I want to object to a good many different parts of your charge; namely "Where your honor says the due care must be commensurate care, etc.

"That it is not necessary that the defendant need know just what accident would happen, but he must have in mind the probable harmful consequences, and when probable harmful consequences may come, his care must be commensurate with the probable consequences. I object to so much of the charge as relates to that.

"Whether there was any danger that was liable to happen. Was it liable to result in injury to persons in the elevator? I object to so much of your honor's charge as says that.

"How would it affect the lever? How would it affect the operator? It might fall on the lever and start, or it might fall on his arm and cause it to start. I object to that.

"If he didn't have hold of it he would naturally grab for it; whatever your honor said on that point.

"That the defendants ought to have had in mind what things were liable to happen if the condition of the movable frame was calculated to cause harmful consequences; that the defendant would be liable.

"If harmful consequences were liable to happen from it, although the particular consequences, etc., that he would still be liable if the consequences were liable to happen."

It must be the care which is equal and proportionate to the probable harmful consequences that may follow from the lack of its exercise." If the word "commensurate" had been objectionable, the rest of the proposition is undoubtedly correct. See for example *Cayzer v. Taylor*, 10 Gray, 274; *Gardner v. Boston Elevated Railway*, 204 Mass. 213; *McCrea v. Beverly Gas & Electric Co.* 216 Mass. 495. And the meaning which the word "commensurate" had in this sentence was explained by the rest of the proposition laid down by the presiding judge. But the word "commensurate" has been approved by this court when used as it was used by the presiding judge. *Galligan v. Old Colony Street Railway*, 182 Mass. 211, 215. Indeed it has been used by this court in stating the proposition which the presiding judge was stating. *Pomeroy v. Boston & Northern Street Railway*, 193 Mass. 507, 510. *Marshall v. Boston & Worcester Street Railway*, 195 Mass. 284, 287.

In the other portions of the charge objected to the presiding judge was stating and developing the proposition of law established by *Higgins v. Dewey*, *ubi supra*, and the other cases cited above. What was there said was both correct and accurate.

The exception taken to the admission of evidence has not been argued, and we treat it as waived.

The exception taken to the refusal of the judge to set aside the verdict on the ground that the damages were excessive,* must be overruled. The question presented by this exception is not whether we should have exercised our discretion in the way in which the judge exercised his discretion. It is whether the judge abused his discretion. See *Edwards v. Willey*, 218 Mass. 363, 365. To sustain the exception it is necessary that we should decide that the judge could not honestly have taken the view taken by him. It is impossible to say that, and the result is that this exception must be overruled.

Exceptions overruled.

J. Lowell, (*J. A. Lowell* with him,) for the defendants.

R. Spring, for the plaintiff.

* The verdict was for the plaintiff in the sum of \$15,000.

GERMAN P. NOYES vs. JOHN W. BRAGG & another.

Franklin. October 9, 1914. — January 8, 1915.

Present: RUGG, C. J., LORING, DE COURCY, & CROSBY, JJ.

Equity Jurisdiction, Specific performance. Contract, Performance and breach. Frauds, Statute of. Equity Pleading and Practice, Bill, Parties, Motion to dismiss, Decree, Appeal. Interest.

It is no defence to a bill to enforce the specific performance of a contract to convey real estate that the plaintiff might recover damages at law for the defendant's breach of his contract.

In a suit in equity to enforce the performance of a contract in writing to convey to the plaintiff certain real estate upon the payment by the plaintiff of the purchase money in full by monthly instalments as provided for in the contract, if the plaintiff shows that up to a certain time he had made all the payments required and that he tendered to the defendant the amount of an instalment then due, whereupon the defendant refused to receive the payment of the instalment and conveyed the real estate to a third person, this gives the plaintiff the right to a decree for specific performance without showing that he went through the nugatory act of making any further tender to the defendant.

In a bill in equity to compel the specific performance of a contract to convey real estate, it is not necessary to set forth any special reason why the plaintiff is entitled to relief in equity.

Because it here was found as an inference of fact that the "Leonard Farm" in Greenfield, which was described fully in an agreement in writing made in 1909, was the same property referred to as the "Leonard Place" in another contract in writing made between the same parties in 1913 to convey that property, it followed that there was a contract or memorandum in writing sufficient to satisfy the statute of frauds in a suit in equity to enforce the performance of the contract to convey the property.

A motion to dismiss a bill in equity is not the proper way to take the objection that necessary parties have not been joined as defendants.

In a suit to enforce the specific performance of a contract to convey to the plaintiff certain real estate of which the plaintiff has been in possession under the contract, where it appears that the plaintiff is entitled to a deed conveying to him a good title to the real estate in question subject to the rights of a telephone company that were acquired after the making of the contract and for which the plaintiff had accepted payment, a decree that orders the defendant to convey the property to the plaintiff by a warranty deed is in that respect erroneous.

In a suit in equity to enforce the specific performance of a contract in writing to convey certain real estate to the plaintiff for \$1,100 "with interest from date" the plaintiff to pay \$25 in each month until the price is paid in full and to pay insurance and taxes, a decree ordering the defendant to deliver a deed of the property to the plaintiff on payment by the plaintiff of the full amount of the purchase money, with interest at the rate of six per cent per annum from the

date of the agreement until the date of the filing of the bill, is not fair to the defendant, who is entitled to interest at six per cent per annum upon the purchase money until it is paid in full by monthly instalments of \$25 and not merely to interest at that rate to the date of the bringing of the suit.

In a suit in equity to enforce the specific performance of a contract to convey certain real estate to the plaintiff, where a decree ordering a conveyance of the property to the plaintiff is defective in failing to require the defendant to insert in the deed a full description of the property as described in a previous agreement between the parties, and the defendant appeals from the decree but the plaintiff does not appeal, the decree will not be changed in this respect for the benefit of the plaintiff who has not complained of it.

LORING, J. This case comes up on an appeal from a final decree entered on a master's report to which no exceptions were taken. The evidence before the master was not before the Superior Court and so is not before us.

The facts found by the master are in substance as follows: On November 17, 1909, the defendant Bragg made a written agreement with the plaintiff and his two sons to sell to them a piece of land in Greenfield "known as the 'Leonard Farm'" which was therein bounded and described. The price was \$1,300, \$100 of which was paid at the making of the agreement and the balance was to be paid in monthly instalments. The plaintiff and his sons entered under that agreement and paid the sum of \$675 toward the purchase money. About three years later (in the autumn of 1912) the plaintiff's sons surrendered their rights in the contract to their father who alone continued to live upon the farm. The plaintiff relinquished his rights under the old agreement on the making of "an entirely new oral contract" which he made with the defendant Bragg. This new contract was afterwards reduced to writing. This writing was in these words: "Greenfield, Mass., April 1, 1913. Agreement between J W Bragg & German Noyse Said Noyse agrees to Pay said Bragg \$1100 dollars with interest from date for the Leonard place so called & is to pay \$25.00 each month untill paid in full also Insurance & Taxes I witness thereof we have set our Hand & Seal J W Bragg G. P. Noyes." The plaintiff continued to occupy the farm under the new contract. He made payments under the new contract amounting to \$200. In October, 1913, he offered to make payment of a \$25 instalment. The defendant refused to accept the money. At that time the plaintiff was not in default in any payment called for by the contract. "In November 1913," the defendant conveyed the farm to

Queenie L. Purrington, one of the defendants in this suit. Queenie L. Purrington was the wife of the defendant's son. She was a volunteer under her husband. Her husband (as the master found) took with full knowledge of the fact that there was an outstanding contract between the defendant and the plaintiff. In fact he had tried to buy the farm from the plaintiff and on the plaintiff refusing to sell it to him he undertook to get a conveyance from the defendant in fraud of the plaintiff's rights.

The defendant demurred to the bill and filed a motion to dismiss. A final decree in favor of the plaintiff was entered in the Superior Court. By the final decree the demurrer was overruled, the motion to dismiss was disallowed and the plaintiff was given the relief he asked for. The decree is set forth in the note.*

* Final Decree. "This case came on to be heard at this sitting of the Court upon the plaintiff's bill and the amendments thereto, the answers of the defendants, the motions of the defendants to dismiss the bill, the demurrers of the defendants to the bill, and the report of the master, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed,

"1. That the defendants' motions to dismiss the bill be disallowed.

"2. That the defendants' demurrers be overruled.

"3. That the Report of the Master be confirmed and the findings therein adopted.

"4. That the defendant Queenie L. Purrington be enjoined permanently from prosecuting her action in the District Court of Franklin County, described in the eighth paragraph of the bill.

"5. That the defendant Queenie L. Purrington shall forthwith release and quitclaim to the defendant John W. Bragg, all interest she may or appear to have in the premises which the said defendant Bragg assumed by his deed of conveyance dated November 1st, 1913, recorded in the Franklin County Registry of Deeds, Book 595, Page 177, to convey to her.

"6. That thereupon the defendant John W. Bragg shall execute and deliver to the plaintiff, German P. Noyes, a good and sufficient warranty deed of conveyance of said Premises mentioned in paragraph 5 of this decree, free from all encumbrances, excepting whatever right the New England Telephone and Telegraph Company may have had in said premises prior to the bringing of this action, and the taxes upon said premises for the year 1914; and upon the delivery to him of such deed the plaintiff shall then and there pay to the defendant Bragg the sum of the purchase price stated in the agreement between them, to wit, eleven hundred dollars plus interest thereon at the rate of six per centum per annum from April 1st, 1913 to the date of the bringing of this action, and the taxes paid by the said defendant Bragg for

One only among the many objections made by the defendant is well taken. But there are two matters not objected to by him in which the decree is wrong.

1. The objection that the plaintiff had an action at law to recover damages for breach of agreement does not deprive equity of its jurisdiction to compel specific performance of the contract. *Jones v. Newhall*, 115 Mass. 244, relied upon by the defendant was decided before St. 1877, c. 178 (now R. L. c. 159, § 1) was enacted. St. 1877, c. 178 (now R. L. c. 159, § 1) was enacted to avoid the conclusion which the court was forced to adopt in *Jones v. Newhall* and similar cases. See *Dole v. Wooldredge*, 135 Mass. 140; *Boston & Maine Railroad v. Sullivan*, 177 Mass. 230. But even in *Jones v. Newhall* the jurisdiction of the court to compel specific performance of a contract for sale of real estate was recognized. See *Jones v. Newhall*, *ubi supra*, at page 248.

2. The plaintiff had a right to act upon the defendant's refusal to accept the payment which he tendered in October. It was not necessary after that for the plaintiff to go through the nugatory act of making a further tender.

3. The allegations of the bill are not uncertain, vague and indefinite.

4. It is not necessary in a bill to compel specific performance of a contract to convey real estate to set forth any special reason why the plaintiff is entitled to relief in equity.

5. The issue of the statute of frauds does not seem to have been in the mind of the master when he made his findings. If there had been direct evidence that the defendant did not own two parcels of land in Greenfield, one known as the "Leonard Farm" and the other known as the "Leonard Place," there would have been no question as to the identification of the land covered by the agreement of April 1, 1913. *Harrigan v. Dodge*, 200 Mass.

the year 1913, after deducting therefrom the sum of two hundred dollars, the sum of the payments heretofore made thereon. The delivery of the said deed by the defendant Bragg, and the receipt thereof by the plaintiff, shall be made in the office of the Registry of Deeds of the said County of Franklin as soon as reasonably may be hereafter:—provided however, that the said defendant Bragg shall give to the plaintiff forty-eight hours' notice of the time when he will be prepared to deliver said deed at the place above stated.

"7. That the defendant Bragg pay to the plaintiff his costs in the sum of (\$27.97) twenty-seven dollars and ninety-seven cents."

357, 359. See cases collected in *Desmarais v. Taft*, 210 Mass. 560. The "Leonard Farm" was fully described in the agreement of November 17, 1909. Taking the agreement of April 1, 1913, in connection with the agreement of November 17, 1909, and the transactions between the defendant and the plaintiff found by the master, we are of opinion that the only fair inference from the facts stated in the report is that the "Leonard Place" referred to in the agreement of April 1, 1913, is the "Leonard Farm" referred to in the agreement of November 17, 1909. It follows that the statute of frauds was complied with.

6. There were no laches on the part of the plaintiff. The master in his findings did not state the day in October when the tender refused by the defendant was made by the plaintiff. In his brief the defendant assumed that it was made on the thirty-first day of that month. The fraudulent conveyance to the defendant Purrington was made some time "in November." It is stated that the deed to her was dated November 1. The defendant Purrington undertook to enforce her rights under that deed by suing out a writ to obtain possession of the premises on December 1, 1913. The present bill was filed on December 6, 1913. On these facts the plaintiff seems to have acted with reasonable promptitude. What is of more importance, no rights of any party intervened.

7. A motion to dismiss a bill in equity is not the proper way of taking the objection that necessary parties defendant have not been joined. In addition to that the objection of non-joinder of necessary parties defendant in the case at bar was cured by the second amendment to the bill.

8. The final decree is wrong in depriving the defendant of the right which he had under the contract to leave his money at interest at six per cent until the purchase price was paid in monthly instalments of \$25 a month.

9. The amount of the taxes paid by the defendant Bragg for the year 1913 should have been stated in the decree and the new decree should state the amount of taxes for that year and those for the year 1914. It was proper in the decree to provide that papers should be passed at the registry of deeds when the transaction was closed by payment of the final sum due. The provision that the defendant should give forty-eight hours' notice is not

unreasonable. These provisions are not in conflict with the contract of April 1, 1913, but are proper in working out the rights of the parties under that contract.

10. There are two matters in the decree not objected to by the defendant which are prejudicial to him. He has taken an appeal from the decree and we think that they should be corrected. Under the agreement of April 1, 1913, the plaintiff is entitled to a deed which shall convey to him a good title to the "Leonard Place" subject to the rights of the New England Telephone and Telegraph Company which have been acquired by that company since the agreement and for which the plaintiff has accepted payment. The decree requires the defendant to give the plaintiff a warranty deed. In that respect it is wrong.

11. The other provision of the decree not objected to by the defendant but which is prejudicial to his rights is that the defendant is entitled to interest at six per cent upon the purchase money until it is finally paid in full and not merely six per cent "to the date of the bringing of this action" as provided in the decree.

12. We find no error in the decree in the matter of insurance. It was found by the master that the premium on the policy of insurance on the property in the spring of 1912 was "charged against his [the plaintiff's] account" and so was paid by him.

13. The defendant Purrington is a mere volunteer from one who had full notice and she has no rights which should be protected in the decree.

14. The decree ought to have provided that the deed to the plaintiff should fully describe the land in the agreement of November 17, 1909, in place of providing that it should convey the premises mentioned in paragraph 5 of this decree. But the plaintiff, not having taken an appeal from the decree, is in the position of standing satisfied with it, and no change in that respect should be made.

15. The decree appealed from should be modified in the following particulars: (a) By striking out the word "thereupon," being the second word of article 6 of the decree. (b) By striking out the word "warranty" in the same article of the decree. (c) By striking out the following words in the same article, to wit, "and the taxes upon said premises for the year 1914; and upon the

delivery to him of such deed the plaintiff shall then and there pay to the defendant Bragg the sum of the purchase price stated in the agreement between them, to wit, eleven hundred dollars plus interest thereon at the rate of six per centum per annum from April 1, 1913, to the date of bringing this suit and the taxes paid by the said defendant Bragg for the year 1913, after deducting therefrom the sum of two hundred dollars, the sum of the payments heretofore made thereon." (d) For these words a provision should be substituted providing that the deed theretofore in article six directed to be made by the defendant should be delivered upon the plaintiff paying the balance of the purchase money in monthly instalments of \$25 each with interest at six per cent and all sums now due for insurance and taxes and all sums hereafter falling due for insurance or taxes; the details of this portion of the decree to be settled in the Superior Court. (e) There should be stricken out from said article six of the decree the words "as soon as reasonably may be hereafter" and in place thereof there should be inserted "upon payment of the last sum due under the contract of April 1, 1913." (f) The plaintiff is entitled to recover his costs up to the date of the amended decree, and the seventh article of the decree should be modified accordingly.

So ordered.

The case was submitted on briefs.

W. A. Davenport, for the defendant Bragg.

L. W. Griswold, for the plaintiff.

NELSON D. ARMSTRONG vs. JORDAN S. ORLER.

Suffolk. October 9, 1914. — January 8, 1915.

Present: RUGG, C. J., LORING, DE COURCY, & CROSBY, JJ.

Equity Pleading and Practice, Appeal. *Frauds, Statute of. Election. Pledge. Contract, Construction.*

On an appeal from a final decree in a suit in equity entered in pursuance of findings of fact made by the judge who heard the case, if the evidence on which these findings were based is not a part of the record, the only question presented is whether on the findings of the judge the decree entered was a proper one.

Where an oral contract is made for the sale of certain shares of stock for a price of more than \$50 and the seller agrees as a part of the contract of sale that, if at any time the buyer wishes to return the shares, the seller will buy them back from him at the same price, and under this contract the shares are delivered to the buyer and are accepted and received by him, that is a satisfaction of the statute of frauds as to the entire contract, and, in a suit in equity brought by the buyer to compel the seller to perform his agreement to take back the shares at the same price, the want of a memorandum in writing under R. L. c. 74, § 5, is no defence.

Where a contract was made for the sale of certain shares of stock with an agreement that, if at any time the buyer wished to return the shares, the seller would buy them back from him at the same price, in a suit in equity by the buyer to compel the seller to take back the shares at the original price, where it appeared that the plaintiff's demand upon the defendant to take back the shares was made about nine months after the making of the contract, it was *held*, that on the facts found by the trial judge the demand to take back the shares was made within a reasonable time.

Where a contract is made for the sale of certain shares of stock with the agreement that, if at any time the buyer wishes to return the shares, the seller will buy them back from him at the same price, a pledge of the shares by the buyer to the seller to secure a loan of money to the buyer is not an election by the buyer to keep the shares and not to insist on the seller's promise to buy them back, and the buyer may maintain a suit in equity to compel the seller to buy back the shares at the original price in order that he may apply so much of the proceeds as is necessary to the payment of the debt for which he has pledged the shares to the seller himself.

Where a contract is made for the sale of certain shares of stock with the unqualified agreement that, if at any time the buyer wishes to return the shares, the seller will buy them back from him at the same price, this does not mean merely that the buyer may return the shares if he is dissatisfied with the purchase, because the agreement to buy back the shares is absolute and the reason of the buyer for wishing to return them is immaterial.

LORING, J. This case comes before us on an appeal taken by the defendant from a final decree. The decree was entered pursuant to findings of fact made by the judge who heard the case in the Superior Court. The evidence on which these findings were made is not part of the record. The findings therefore are final, and the only question before us is whether on these findings the decree entered was proper.

The judge found that on April 7, 1913, the defendant sold the plaintiff fifty shares of the common stock of the Birmingham, Ensley and Bessemer Railroad Company, and later that he made another sale to the plaintiff which it is not necessary to state. He found that the defendant made the agreements that the plaintiff alleged were made by him as to both of these transactions. The plaintiff's testimony as to both of these transactions was this:

"All these purchases were made on oral agreements, made as a part of each contract of sale, that the defendant would buy back from the plaintiff these stocks and bonds at any time he (the plaintiff) desired to return the same, and pay the plaintiff therefor the amounts that he had paid to the defendant as the purchase prices therefor."

On June 19, 1913, there was another transaction between the plaintiff and the defendant which resulted in the defendant's delivering to the plaintiff ninety shares of the common stock of the Beacon Mortgage and Realty Company, and the plaintiff testified that he "received this stock with an agreement, made as a part of the transaction, in substance that the defendant would purchase said stock and take the same off his (the plaintiff's) hands for the amount he paid for it at any time the plaintiff so desired." The judge found that the defendant "did so agree."

On September 18, 1913, the plaintiff borrowed of the defendant \$500 and pledged the fifty shares of the railroad stock as collateral. On October 14, 1913, the plaintiff borrowed of the defendant \$2,500, on an agreement to pay for principal and interest \$2,600 on January 1, 1914, and pledged with the defendant as security the ninety shares of the stock in the Beacon Mortgage and Realty Company. On December 31, 1913, the plaintiff, through his counsel, demanded payment of the purchase price of the railroad stock less the \$500 and interest owed by him on the loan for which that stock was pledged as collateral and \$2,000, being the difference between the purchase price of the Beacon Mortgage and Realty Company stock and the \$2,500 borrowed on October 14, 1913. On the same December 31, 1913, the defendant demanded payment of the two notes of \$500 and \$2,500.

This bill was filed on January 1, 1914, to compel the defendant to take back the fifty shares of railroad stock and the ninety shares of Beacon Mortgage and Realty Company stock and pay the plaintiff the difference between the purchase price of these two sets of securities and the amounts due the defendant under the two loans mentioned above for which these securities had been pledged as collateral security. A decree to that effect was entered in favor of the plaintiff by the presiding judge, and it is from that decree that this appeal is taken.

1. The first objection made by the defendant is that his oral

agreement to take back the stock was a contract for the sale of goods, wares or merchandise within the statute of frauds, R. L. c. 74, § 5, and so not "good or valid." But it was found by the judge that this agreement to buy back these securities was a part of the original agreement of sale by which the defendant sold the securities to the plaintiff. The statute of frauds as to that agreement of sale (including the agreement to buy back the shares at any time the plaintiff desired) was satisfied by the delivery of the shares under this original agreement. That is settled. *Edgar v. Joseph Breck & Sons Corp.* 172 Mass. 581. *Hilliard v. Weeks*, 173 Mass. 304. *Corey v. Woodin*, 195 Mass. 464. *Schaefer v. Strieder*, 203 Mass. 467. Williston on Sales, § 73. In *Boardman v. Cutter*, 128 Mass. 388, relied on by the defendant, the agreement to buy the shares was not a term in a contract of sale where the statute of frauds was satisfied by a delivery of the shares sold under the original agreement of sales. The oral agreement to buy the shares in that case was a collateral, independent agreement made to induce the plaintiff to subscribe to stock in a corporation which was then in process of being formed.

2. The next objection taken by the defendant is that the plaintiff's demand upon the defendant to take back the stock was not made within a reasonable time. On the facts found by the judge we are of opinion that it was.

3. A further objection is that the plaintiff by pledging these stocks with the defendant had elected not to insist upon the defendant's agreement to buy them back if at any time the plaintiff so desired. Whether there would have been election if the plaintiff had pledged the stock with a third person need not be considered. We are of opinion that there was no election when he pledged the stocks with the defendant himself.

4. The defendant's last objection is that the plaintiff's option was to force the defendant to take back the stock if the plaintiff was dissatisfied with the purchase, and that on the facts it is evident that the reason for the plaintiff's insisting upon the defendant's taking back the stock was because he did not want to pay the note which became due on the day after his demand, namely, on January 1, 1914. But the agreement found by the judge to have been made by the defendant was not an agreement to take back upon the plaintiff's being dissatisfied with the purchase,

but was an absolute agreement that he "would buy back from the plaintiff these stocks and bonds at any time he (the plaintiff) desires to return the same."

The entry must be

Decree affirmed with costs.

H. Williams, Jr., (L. C. Bigelow with him,) for the defendant
Order.

W. H. Foster, (D. A. Pfromm with him,) for the plaintiff.

ADA T. MUNROE vs. CITY OF WOBURN.

Middlesex. November 11, 1914. — January 8, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Damages, Indemnity for loss and expense due to abandoned taking. Eminent Domain. Evidence, Competency. Words, "Loss."

In that part of R. L. c. 48, § 69, which provides for an indemnity to a person who has suffered loss or been put to expense by reason of proceedings relating to the taking of land for a town way or a private way, and which by § 94 of the same chapter is made applicable to takings for similar purposes by a city, the substitution of the word "loss" for the word "trouble," which was used in the earlier revisions, did not change any of the elements of damage which are recoverable and which were defined in *Whitney v. Lynn*, 122 Mass. 338.

Where a city by proper proceedings for the purpose of widening a street made a taking of a strip of land from the side of a lot at the corner of that street and another street, which taking became void under R. L. c. 48, § 92, because the city for two years failed to take possession of the land for the purpose of widening the street, the owner of the land, who, before the taking, had made plans and arrangements for the erection of a new brick building upon the premises to take the place of a building which recently had been destroyed by fire, and who because of the taking had been compelled to abandon such plans and arrangements and had been deterred from erecting any building upon the premises during the two years, cannot recover, in a petition under R. L. c. 48, §§ 69, 94, as "indemnity for loss or expense incurred by the proceedings" loss of rentals which he would have received from the proposed building, loss by reason of inability, caused by the taking, to make an advantageous sale of the property, amounts paid to architects for changes in building plans and amounts paid as taxes during that period either upon the whole lot or upon the portion included in the taking.

At the trial of a petition under R. L. c. 48, §§ 69, 94, for indemnity for loss or expense incurred by proceedings resulting in a taking by a city of land for the widening of a street which became void under § 92 of that chapter by reason of the failure of the city to take possession of the land for that purpose, it is

proper for the judge to refuse to permit the petitioner to be asked, "What do you consider that your loss has been by the action of the city council in taking this land?" and to refuse to permit a qualified expert, testifying for the petitioner, to be asked, "What is your estimate of the loss to the petitioner by the action of the city council in that taking?" because the questions would permit the witnesses to include in their answers elements of damage not contemplated by the statute.

PETITION, filed in the Superior Court on November 23, 1911, under R. L. c. 48, §§ 69, 94, for indemnity for loss and expense incurred by proceedings of the city of Woburn in taking for the widening of Union Street a strip of land from a lot of the petitioner at the corner of Main Street and Union Street in that city, the taking having become void under § 92 by reason of the respondent having failed for more than two years to make an entry for possession of the land.

In the Superior Court the case was tried before *Quinn, J.* It appeared that on February 18, 1908, there was a building on the petitioner's premises which was leased to a tenant who used it as a department store. On that day the building was destroyed by fire. On December 18, 1908, the order for the taking of the petitioner's land, above referred to, was passed.

The petitioner offered to show that immediately after the fire and before the taking by the city she had made arrangements to build a new brick building upon her land, and she had employed an architect who made plans to cover the whole of the frontage of her land on Main Street and she offered evidence of the sum of money that she had paid the architect therefor; that she then received notice of the action of the city council upon the matter of the taking, which interfered with her erecting the building that she had proposed to build and made it necessary for her to change her plans, which put her to expense; that she obtained estimates from builders of the cost of a building on the plans covering the whole lot and on the altered plan covering only the portion not included in the taking; that if she built the smaller building she would not be using the land in the most advantageous way, and if later no entry were made to complete the taking it would have been expensive and unprofitable to build a separate building twelve feet in width; that previous to the taking she had prospective tenants ready to take the building as soon as completed; that she also had purchasers for the land; that the act of

the city in making a taking made it necessary for her to erect a building which would be a less profitable investment upon a narrower frontage or to build over the whole lot with knowledge of the taking which would prevent her recovery of damages for the portion of the building built over the land taken; that she was deprived of the use of the whole lot of land as well as the portion covered by the taking.

The petitioner further offered to show that she lost the rentals from the proposed building and lost the use of the land during the two years after the passage of the order of taking and the latest date on which the city council could complete the taking by an entry, and to show the amount of that loss. She also offered evidence of the amount of taxes paid on the land by her during the two years while the taking of the city was in force, of the time spent in conferring with architects, builders and real estate men regarding the construction of buildings on the premises, and of the time she spent consulting with real estate men with regard to the sale or use of the property.

The evidence thus offered was excluded, subject to exceptions by the petitioner.

The petitioner was permitted to testify as to the amount of time that she had spent in consulting with architects, counsel, officials of the government, and others, in regard to the taking of the land by the city, and as to the amounts paid by her to counsel or real estate experts in connection with the taking by the city.

The petitioner was asked, "What do you consider that your loss has been by the action of the city council in taking this land?" And Charles A. Gleason, a real estate dealer and broker, whose qualifications as a real estate expert for Woburn and vicinity were admitted by the respondent, and who had testified that he was acquainted with the land in question in Woburn and its value, was asked, "What is your estimate of the loss to the petitioner by the action of the city council in that taking?" Both these questions were excluded, subject to exceptions by the petitioner.

It was agreed that from the time that this building was burned there had been no building erected upon the land, or any construction of any kind up to the date of trial and that the reason why a building had not been erected was because of the uncertainty as to the city completing its taking.

On the ruling of the judge that, upon the evidence offered by the petitioner, loss and expense must be confined to the plaintiff's loss of time and to amounts paid to counsel and to real estate men on account of the taking by the city, it was agreed that these three items amounted to \$250. A verdict accordingly was returned for that amount; and the petitioner alleged exceptions.

H. H. Newton, (C. A. Parker with him,) for the petitioner.

J. E. McConnell (J. F. Maloney with him,) for the respondent.

DE COURCY, J. The petitioner owns a large lot of land on Union and Main streets in Woburn. In December, 1908, an order was duly adopted by the city to take a strip of this lot for the purpose of widening Union Street; but as the land was not entered upon to complete the taking, she became entitled to "indemnity for loss or expense incurred by the proceedings," by virtue of R. L. c. 48, § 69. The questions raised at the trial involve the construction of this statute.

The trial judge ruled that upon the evidence offered by the petitioner her "loss and expense" must be confined to her loss of time, and the amounts paid to counsel and to real estate men on account of the taking by the city, amounting in all to \$250. Her contention is that she was entitled also to recover for the loss of rentals on a proposed building which she contemplated erecting on the premises and was deterred from erecting by reason of the order of taking; for the loss of opportunity to make sales of the land during the two years after the respondent's right to take possession accrued (R. L. c. 48, § 92); for money paid to architects for changes in the plans; and for the amount paid by her during the two years for taxes on the whole lot, or at least on the part covered by the taking.

The main controversy between the parties relates to the significance and scope of the word "loss" in § 69 of the statute; and that must be ascertained, not by analyzing the comprehensive and different definitions of the word, but by determining the sense in which the Legislature used the word in this particular connection. A brief reference to the history of the statute may aid us in interpreting the legislative intent. See *Sears v. Nahant*, 215 Mass. 234.

Before 1842, when a public way once was established, both the right of the public to a permanent easement and the right of the

landowner to damages became vested, and the owner became entitled to his damages although his land never was entered upon and although the way had been discontinued without ever being used by the public. *Harrington v. County Commissioners*, 22 Pick. 263. *Hallock v. Franklin*, 2 Met. 558. Presumably it was in consequence of such decisions that the St. of 1842, c. 86, § 1, was passed, by which it was enacted that no person claiming damage should have a right to demand the same until the land had been entered upon and possession taken for the purpose of constructing a highway; and further, that when put to "any trouble and expenses" by the proceedings, he should be allowed full indemnity therefor, although his land might not be entered upon or taken possession of. The history of the subsequent extension of the statute, and of the provision that the layout or alteration should be void as against the owner of the land unless possession should be taken within two years, is traced in *Corey v. Wrentham*, 164 Mass. 18, 22.

The case of *Whitney v. Lynn*, 122 Mass. 338, arose under Gen. Sts. c. 43, §§ 14, 63, which retained the words "trouble and expense" of the original statute of 1842. Under the charge of the judge of the Superior Court the petitioner was allowed to recover, among other things, for the uncertainty as to whether the land was to be entered upon by the city or not, in which he had been kept during the two years from the taking. In setting aside the verdict this court used the following language: "The word 'trouble' in the statute refers to trouble from which some material or pecuniary injury results, involving labor and the expenditure of time, or occasioning inconvenience to the owner in the use and occupation of the land; all of which may be estimated in damages by a standard common to all cases." While it is true that in R. L. c. 48, § 69, the word "loss" is substituted for "trouble," which was used in the earlier revisions, it does not appear that the Legislature intended to make any change in the elements of damage from those defined in the Whitney case.

In the case at bar the petitioner was allowed compensation for the expenses she incurred and for the time she lost on account of the taking by the city. Her control over and her use and occupation of the land was not interfered with by the city while the proceedings were pending. If there had been buildings thereon she and not the city would have been entitled to the rents. The only

compensation ordinarily allowed for the delay in payment until possession is taken by the city and for the trouble occasioned by the incipient appropriation of the land to public use, is that of interest. *Edmonds v. Boston*, 108 Mass. 535, 551. It is not to be assumed that a municipality, in dealing with one of its own tax payers, will defer the entry and keep the owner in suspense for the full two years unless it honestly intends to take possession of the land and to pay the owner therefor. Nor is it contended here that the city acted otherwise than in good faith and in the exercise of its legal rights. If it had carried out the contemplated street widening, it would have been obliged to pay to the plaintiff only the value of the land taken and the damage to her remaining land consequent on the taking, with interest. The contention that now, although the city has not actually taken her land, it must pay her the speculative profits that she might have derived from a building that she intended to erect thereon, finds no support in the language or the spirit of the statute. The payment of the taxes was rightly borne by her, as she had the exclusive use of the land during the entire period. The expense for plans which would be available only in the event that the city should not complete its taking, does not come within the statute. In this respect the situation of the plaintiff is not unlike that of a gas company after the passage by a municipality of the first vote to acquire its plant. See St. 1891, c. 370, § 12, as amended by St. 1893, c. 454, § 5. Practically the company makes additions at the risk of not being paid for them in the event of a purchase by the city; and it may refrain from making improvements on account of the uncertainty as to final action of the municipality. There are doubtless other instances where the exercise of a public right to take the property of an individual may at times result in delay and uncertainty that are detrimental. But it rests with the Legislature to determine the necessity and provide the remedy for such exceptional instances.

Plainly the broad question asked of the petitioner and the expert, as to the loss she sustained by the action of the city council, was incompetent. The only elements of damage that were material were those contemplated by the statute.

Exceptions overruled.

INTERNATIONAL TRUST COMPANY vs. HARRIS LIVERMORE &
others, trustees.

Suffolk. November 13, 1914. — January 8, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Assignment, For benefit of creditors.

Where, in a suit in equity by a creditor of one, who had made a common law assignment for the benefit of his creditors, against the assignee to compel him to permit the plaintiff to share in the benefits of the assignment, it appears that the assignment provided among other things that only such creditors should share in its benefits as executed the instrument or otherwise accepted it in writing to the satisfaction of the assignee within sixty days from its date or within such further time as the assignee should allow in writing, that the assignee gave to the creditors a notice in writing stating the fact of the assignment and enclosing a blank for an assent in writing but making no reference to the limitation of time within which assent should be given, and filed a copy of the assignment with the clerk of a city, where, presumably, the debtor's principal place of business was, in conformity with the requirements of R. L. c. 147, § 22; and where, on conflicting evidence, a judge who heard the case found that the plaintiff knew that at some time he must sign an assent if he wanted to be a party to the assignment and that probably a time limit for assent was fixed in the instrument, but refused to give such assent until after the sixty days limitation had expired, believing that he possessed means of compelling a more advantageous settlement from the debtor, and that, although the plaintiff never had nor saw a copy of the assignment, the assignee did nothing to conceal from him the exact time limited for his assent, the suit must be dismissed.

DE COURCY, J. On December 27 or 28, 1911, Harry M. Lamb made a common law assignment of all his property to the defendants, in trust for the benefit of his creditors. By its terms only those creditors were entitled to share in the benefits of the instrument who should "execute these presents, or otherwise accept the same in writing to the satisfaction of the said parties of the second part [the assignees] within sixty days from the date hereof, or within such further time, if any, as said parties of the second part shall allow in and by a writing," etc. A notice of the assignment * was sent by the assignees to the plaintiff on December 28, 1911; but it did not assent thereto during the sixty days. The

* This notice was signed by the defendants and read as follows: "Boston, Dec. 28, 1911. To the creditors of Harry M. Lamb, Gentlemen: Harry M. Lamb, of North Wilmington has this day executed to us an assignment of all his property, in trust for the benefit of his creditors, without preference or priority except as provided by law. We have accepted the trust. A general meeting of the creditors will be held at Room 322, 53 State Street, Boston, on

plaintiff did forward a written consent on March 6, 1912,* but the defendants then declined to allow it to be a party to the assignment; and this suit was brought to compel them to do so.

We cannot say that the trial judge, who saw the witnesses, was not justified by the evidence in making among others the following findings of fact: The officers of the trust company knew that at some time they must sign on behalf of the corporation if they wanted it to become a party, and that probably a time limit for assent was stipulated in the assignment; yet they refused to give such assent within the period prescribed, believing that they possessed means of compelling a settlement more advantageous to the plaintiff than they would get under the assignment. The defendants did nothing to conceal from the plaintiff the exact time limited for its assent, and copies of the assignment were on file at the office of the city clerk of Boston,† and in the registry of deeds at East Cambridge.

On the facts as found it is settled by our decisions that the plaintiff is not entitled to the relief it asks for. *National Bank of Commerce v. Bailey*, 179 Mass. 415. *Moulton v. Bartlett*, 195 Mass. 33. A decree dismissing the bill with costs must be entered.

So ordered.

W. M. Richardson & J. R. Lazenby, for the plaintiff, submitted a brief.

W. V. Taylor, for the defendants.

Thursday, January 4th, 1912, next, at 4 o'clock P. M. To expedite a settlement of affairs, we ask you to send us a statement of your account made up to this date, and also to sign and mail to us as soon as possible the enclosed assent to the assignment."

Enclosed with the notice was a blank form for assent and release, reading as follows: "We hereby assent to the terms of a certain instrument of assignment for the benefit of creditors, made by Harry M. Lamb, the said instrument being dated the 28th day of December 1911 and Harris Livermore, Warner V. Taylor, and Samuel O. Reinstein being therein named as assignees; and we hereby become parties to the said instrument as assenting creditor thereunder, and in accordance with the provisions of said assignment, agree to accept in full payment of our debt, claim and demand, the dividends which shall be payable under said assignment, and release, acquit and discharge the debtor from such debt, claim and demand as therein provided. Witness our hand and seal. . . ."

* This assent was by the plaintiff as a creditor "of Harry M. Lamb, doing business as H. M. Lamb & Co., of Boston, Mass."

† See the last clause of R. L. c. 147, § 22.

WESTON MANLEY vs. BAY STATE STREET RAILWAY COMPANY.

Plymouth. November 16, 1914. — January 8, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, Street railway.

At the trial of an action against a street railway company by a milk dealer who received personal injuries when a wagon in which he was travelling was struck by an electric street car operated by the defendant upon a single track railway, there was evidence that, at about half past six in the morning of a day late in October, the wagon was being driven slowly from a cross street upon which the defendant's track was for the purpose of turning to the left on that street, crossing it and entering another street on the other side, that the view from the wagon upon the defendant's tracks to the right was somewhat obstructed, that the wagon had a cover and hood over the seat where the driver and the plaintiff sat, that, when about forty-five feet from the nearest rail of the defendant's track, the driver and the plaintiff looked in both directions on the track and listened and neither saw nor heard a car, that at that point they could see thirty-five feet of the track toward their right, that without looking again they drove toward the track and turned to the left, keeping to the left side of the track because of the condition of the street, when, before the wagon had passed the corner far enough to get straightened out parallel to the sidewalk, its right forward hub was struck by a car of the defendant which had approached from their right at a speed of about thirty-five miles an hour without a gong or any warning being sounded and along a track where the motorman's view was unobstructed for several hundred feet. *Held*, that the questions, whether the plaintiff was in the exercise of due care and whether the motorman was negligent, were for the jury.

At a trial of an action against a street railway company for personal injuries resulting from a collision between an electric street car of the defendant and a wagon in which the plaintiff was travelling, where there was conflicting evidence as to whether the plaintiff looked and listened for cars approaching upon the defendant's track, a request for a ruling, that, "To look when looking is of no avail and to listen for nothing in particular is equivalent to not looking or listening at all, and if this is all that the plaintiff's driver did, the plaintiff is not entitled to damages and your verdict must be for the defendant," properly may be refused.

If, at the trial of an action against a street railway company for personal injuries, one of the defendant's inspectors, who interviewed the plaintiff soon after he received his injuries and who had testified in direct examination by the defendant that the plaintiff at that interview had told him that he did not know who was to blame for the accident, is allowed to be asked in cross-examination, in substance, whether at the time when he took the statement from the plaintiff he knew that, in case of a subsequent trial, the statement would be used as he was using it, and answers, "I hadn't given it a thought," the defendant, on

account of the nature of the answer, cannot have been harmed by the question; and therefore an exception by the defendant to the question and answer will be overruled, irrespective of whether the question was or was not competent, which was not decided.

TORT for personal injuries alleged to have been received, as stated in the opinion, when a milk wagon in which the plaintiff was travelling was struck at about half past six o'clock on the morning of October 26, 1910, by an electric street car of the defendant on Crescent Street in Brockton. Writ dated December 6, 1911.

In the Superior Court the case was tried before *Keating, J.* Material evidence is described in the opinion.

One Dillon, an inspector in the employ of the defendant, in testifying for the defendant in direct examination, stated that he had interviewed the plaintiff in the operating room of a hospital shortly after the accident and that the plaintiff had told him that he did not know who was to blame for the accident. In cross-examination after extended testimony as to friendly relations between himself and the plaintiff and the plaintiff's father, and after stating that it was one of his duties to interview persons injured on the defendant's street railway, he was asked, subject to an exception by the defendant, "You knew that that statement was to be used in case of any claim or suit, didn't you?" and answered, "I hadn't given it a thought." He also made the same reply to the following question, asked subject to the defendant's exception: "You knew that that statement would be used for the purpose for which you are now using it in case of a subsequent trial, didn't you?"

At the close of the evidence the presiding judge refused to rule as requested by the defendant that on all the evidence the plaintiff was not entitled to recover, and that there was no evidence of negligence of the defendant or of due care of the plaintiff, and also refused to give the following rulings, which are referred to in the opinion as properly refused:

"8. If due care requires that the driver of a team shall look or listen before coming into dangerous proximity to a car track, merely looking or listening in such a way that he does not notice what, if he had looked or listened carefully, he would have noticed is not sufficient.

"9. To look when looking is of no avail and to listen for nothing in particular is equivalent to not looking or listening at all, and if this is all that the plaintiff's driver did, the plaintiff is not entitled to damages and your verdict must be for the defendant."

There was a verdict for the plaintiff in the sum of \$11,250; and the defendant alleged exceptions.

Asa P. French, (*R. Brackett* with him,) for the defendant.

H. W. Ogden, (*R. E. Tibbets* with him,) for the plaintiff.

CROSBY, J. At the time of the accident the defendant was operating a single track electric street railway between Brockton and Whitman. The track was in about the centre of Crescent Street, at its intersection with Plymouth Street, in Brockton, where the accident occurred.

Crescent Street runs in an easterly and westerly direction. Plymouth Street opens into Crescent Street from the north, and Crescent Place leads off the southerly side of Crescent Street about eighty-seven feet easterly of Plymouth Street. The distance from the cross walk at the head of Plymouth Street to the nearest or northerly rail of the track is about fifteen feet.

On the morning of the accident the plaintiff, who was a milk dealer, was riding with his driver in a one-horse, covered milk wagon, the cover of which projected over the seat in the form of a hood whose side coverings extended forward at the top farther than at the bottom. The back of the wagon was covered by a curtain, in which was a window about five inches long and two and one half inches wide.

Shortly before the accident the plaintiff had delivered milk at a house on Plymouth Street. The next delivery was to have been made on Crescent Place. After the last delivery the team passed down Plymouth Street in the direction of Crescent Street, the horse being driven by the plaintiff's driver, one Martin. Both the plaintiff and Martin testified that when they arrived at a point about twenty feet northerly of the cross walk on Crescent Street they looked to the west and to the east for electric cars, and also listened, but that neither of them saw or heard a car. The evidence showed that their view to the west was partially obstructed by a building which stood on the northwesterly corner of Crescent Street.

There was evidence that, from the place where the plaintiff and

Martin testified that they looked toward the west, Crescent Street could be seen for a distance of about thirty-five feet, although the plaintiff testified, on cross-examination, that they looked when about opposite the pole on Plymouth Street. If so, it could have been found that they could have seen Crescent Street at that point to the west for a distance of approximately one hundred feet.

There was evidence that the horse was travelling at the rate of five or six miles an hour as they drove into Crescent Street, and that on account of the bad condition of the road on the southerly side they turned to the east and were proceeding on the northerly or left side of Crescent Street, when the hub of the front wheel on the right side of the wagon was struck by the car and the plaintiff was thrown out and injured, either by a kick from the horse or by reason of the wagon running over him.

From the evidence it appeared that when the collision occurred the horse had turned the corner and was facing toward the east, but that the wagon had not passed the corner far enough to become "straightened out" parallel with the sidewalk. There was also evidence that the part of the car that came into collision with the team was at the first window back of the vestibule.

The evidence was conflicting as to the speed of the car, as well as upon the question whether the gong was sounded or other warning was given by the motorman as the car approached the place of the accident. The plaintiff and his driver testified that they did not hear any gong or know of the presence of the car up to the time of the accident. A witness called by the plaintiff testified that no gong was sounded, and that the car was moving at the rate of thirty or thirty-five miles an hour. There was other evidence to show that it was moving at the rate of five or six miles an hour, and that the gong was sounded.

The defendant contends that upon all the evidence a verdict should have been directed for the defendant. It is apparent that the view of Crescent Street to the west was considerably obstructed by the building on the corner, at the place where the plaintiff and his driver testified that they looked for a car, namely, on Plymouth Street, twenty feet northerly of the cross walk. While they did not look again in the direction from which the car came, it is to be noted that the point from which they testified that they looked

was at a distance of about forty-five feet from the northerly rail of the track.

We think that this evidence required the question of the plaintiff's due care to be left to the jury.

It is to be observed that the driver of the team was not attempting to cross the tracks, but had turned into Crescent Street and was proceeding along the left side of the street at the time of the collision. It could not have been ruled as matter of law that the plaintiff was negligent in allowing his team to be driven so near the track as to be struck by the car. *Logan v. Old Colony Street Railway*, 190 Mass. 115. *Vincent v. Norton & Taunton Street Railway*, 180 Mass. 104. It could have been found that as the plaintiff's team approached the cross walk at Crescent Street it slackened its speed and was driven slowly; and that the plaintiff and Martin, before coming out of Plymouth Street, looked in both directions for a car and listened until the time the team was struck. This evidence, if believed, warranted the jury in finding that the plaintiff used his senses actively for his protection.

It could not have been ruled as matter of law that the plaintiff was not exercising due care because he did not look a second time in travelling a distance of less than forty-five feet to the place where the collision occurred; nor could it be ruled as matter of law that the plaintiff was lacking in due care because the team was not stopped, before it was driven out on to Crescent Street, to ascertain whether a car was approaching. *Carrahar v. Boston & Northern Street Railway*, 198 Mass. 549, 552. *Jeddrey v. Boston & Northern Street Railway*, 198 Mass. 232.

There was an unobstructed view of Crescent Street, at the place of the accident, from the west for a distance of several hundred feet. If the jury believed the evidence that the car was running at a speed of thirty-five miles an hour as it came to Plymouth Street, without any gong being sounded or other warning given of its approach, it was plainly for the jury to determine whether the defendant was negligent. *Orth v. Boston Elevated Railway*, 188 Mass. 427. *Kane v. Boston Elevated Railway*, 218 Mass. 101.

In some of the cases relied on by the defendant the plaintiffs were injured at the intersection of streets while travelling on foot, *Hall v. West End Street Railway*, 168 Mass. 461; *Itzkowitz v.*

Boston Elevated Railway, 186 Mass. 142; *Willis v. Boston & Northern Street Railway*, 202 Mass. 463; *Brightman v. Union Street Railway*, 216 Mass. 152; *Plympton v. Boston Elevated Railway*, 217 Mass. 137. These cases are to be distinguished from this case. *Smith v. Holyoke Street Railway*, 210 Mass. 202, and cases cited.

In *Ferguson v. Old Colony Street Railway*, 204 Mass. 340, much relied on by the defendant, the evidence showed that the plaintiff attempted to drive over a crossing which he knew to be dangerous without looking or listening or taking any precautions for his safety. That case is clearly distinguishable from the case at bar.

The exception to the refusal of the judge to give the eighth ruling requested by the defendant cannot be sustained, as it was covered in substance by the judge's charge upon the question of the plaintiff's due care.

The ninth request could not have been given in the form presented.

The exceptions to the admission of the two questions put to the witness Dillon, an inspector of the defendant company, must be overruled; if we assume that the questions were incompetent, the answers show that the defendant was not prejudiced. St. 1913, c. 716. *Koplan v. Boston Gas Light Co.* 177 Mass. 15.

Exceptions overruled.

LOVE BUZZELL vs. R. H. WHITE COMPANY.

Suffolk. November 17, 1914. — January 8, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, In maintenance of revolving door.

The proprietor of a department store cannot be found to have been negligent toward his customers in maintaining at the entrance to the store for the use of persons entering and leaving it a revolving door set in a circular framework and composed of four wings with rubber strips attached from the top to the bottom of the outer edge of each wing for the purpose of preventing the passage of air and of giving the wings an opportunity to revolve without the wood of which they were made coming in contact with the wood of the framework, although the rubber strips are worn so that they do not come in contact with

the circular framework and thus do not retard the rapidity of the door's revolutions, as they otherwise would, and the door revolves at a very high rate of speed on the application of a very slight pressure and has not a governing device sometimes used upon such doors to control their speed, if the door is a standard door installed by a manufacturer who makes over ninety per cent of such doors used in this country and if no more than two out of ninety of such doors have a governing device; nor can such proprietor be found negligent in not providing an attendant at the door to protect persons from being injured by the rapidity of its revolutions.

TORT for personal injuries received as the plaintiff was passing through a revolving door in leaving a department store of the defendant in Boston. Writ dated April 24, 1913.

In the Superior Court the case was tried before *White, J.*, upon an agreed statement of facts substantially as follows:

When the plaintiff started to leave through the revolving door, she waited until all the people ahead of her had passed through, then entered the door and started to go through, when suddenly the door increased its speed as if it had been pushed by some one and began to whirl around rapidly, taking her off her feet and throwing her violently to the floor. She did not trip nor slip on anything. The door was going so fast that she did not have to touch it. It carried her along. She tried to get out quickly as the door came around to the exit, but it was going so fast she could not do it.

The door was a revolving door set in a circular framework with openings in the framework on the inside and an opening on the outside through which people passed to get into the door and out of the door. It was composed of four wings, with rubbers stretched from the top to the bottom along the outer edge of each wing.

Evidence of the plaintiff tended to show that at the time of the accident these rubber strips were worn so that they did not come in contact with the circular framework in which the door revolved, as it was intended they should. These rubber strips were put on the door for the purpose of preventing the passage of air, and at the same time giving the door an opportunity to swing in its framework without the wood of the wings coming in contact with the framework, and when the rubber strips are not worn and come in contact with the circular framework, they have some retarding effect upon the speed of the door and in preventing the door from spinning.

The door was made by the Van Kannel Revolving Door Company, who make over ninety per cent of the revolving doors used in this country, and revolved at a very high rate of speed on the application of very slight pressure. It was the standard revolving door made by the Van Kannel Revolving Door Company, except that its total width from side to side was six inches more than the standard. The Van Kannel Revolving Door Company have installed in this country about forty-five hundred doors of this type, of which about one hundred doors have a device which is described as a governing device, which operates in a manner similar to that of the ordinary liquid cushion spring commonly used on doors. The purpose of the device is to keep the door from spinning. There was no governing device to control the speed of this door, and no other method of controlling the speed of the door, except such as might be exercised by a person who was passing through it; neither was there any attendant or employee of the defendant to caution or guard people in passing through the door, or to regulate its speed.

There were attached to each wing of the door, so as to be in front of a person passing out, two brass hand rails, which stretched from one side to the other of the pane of glass in the panel, horizontally placed.

The judge ordered a verdict for the defendant, and, with the consent of the parties, reported the case for determination by this court, judgment to be entered upon the verdict if the ruling was right; otherwise, judgment to be entered for the plaintiff in the sum of \$2,500.

F. Burke, (*J. P. Bell* with him,) for the plaintiff.

E. I. Taylor, for the defendant.

LORING, J. This case is in the main governed by *Smith v. Johnson*, 219 Mass. 142. The door in question here was a revolving door and not a swinging door as was the door in *Smith v. Johnson*. Both kinds of doors are in common use, and in that respect the cases are alike. There is no more reason for an attendant in case of a revolving door than there was in case of the swinging doors in question in *Smith v. Johnson*.

The fact that some revolving doors in use have a governing device to control the speed of the door and that the door here in question did not have it or any other device to control its speed

was not evidence of negligence on the part of the defendant. A defendant is not liable because he does not provide the newest appliances. See for example *Wolfe v. New Bedford Cordage Co.* 189 Mass. 591. It appeared that the firm which provided the defendant with the revolving door here in question makes ninety per cent of the revolving doors used in this country. It also appeared that of the revolving doors made by it no more than two out of ninety have a governing device.

The fact that rubber strips which were stretched from the top of each wing of the revolving door to the bottom of it and along the outer edge of the wing were somewhat worn was not a ground on which it could be found that the defendant was negligent. In the agreed facts on which the case was submitted it is stated that these rubber strips were put on the door for the purpose of preventing the passage of air, and at the same time giving the door an opportunity to swing in its framework without the wood wings coming in contact with the framework. When the rubber strips are not worn and come in contact with the circular framework of the door, they have some retarding effect upon the speed of the door, preventing the door from spinning. That is to say the rubber strips were not put on for the purpose of retarding the swing of the door. It follows that the fact that they were worn was not evidence of negligence on the part of the defendant.

The conclusion reached in *Smith v. Johnson* appears to be that reached in other jurisdictions. See *Pardington v. Abraham*, 93 App. Div. (N. Y.) 359, affirmed in 183 N. Y. 553; *Dolan v. Callender, McAuslan & Troup Co.* 26 R. I. 198.

The only case of a revolving door which has come to our attention is an unreported case of *Fechney v. Providence Building Co.*, referred to in *Dolan v. Callender, McAuslan & Troup Co. ubi supra*, at page 199.

The entry must be

Judgment for the defendant.

IDEAL LEATHER GOODS COMPANY vs. EASTERN STEAMSHIP
CORPORATION.

Suffolk. December 28, 1914. — January 9, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Carrier, Of goods by water. Contract, Performance and breach. Practice, Civil, Requests, rulings and instructions.

The obligation of a carrier by water to use reasonable promptness in transporting goods delivered to it for that purpose and in notifying the consignee upon their arrival at the port of destination is not affected by the fact that, when the consignor notified the consignee that he had shipped the goods, the consignee wrote to the consignor that he would refuse to accept them; and the consignor is under no duty to acquaint the carrier with such expressed intention of the consignee.

Where a steamship company, which was a common carrier by water, received a case of goods in Boston for shipment to New York, and failed to notify the consignee of the arrival of the goods for a period of three or four months after their shipment, the carrier may be found liable to the consignor either for a breach of the contract of shipment or for a breach of its common law duty as a common carrier of goods by water.

In determining whether a judge, by whom a case was heard without a jury, was right in refusing to rule that "on all the evidence the plaintiff" was "not entitled to recover, and judgment must be for the defendant," no question of pleading is open.

PIERCE, J. This is an action of contract or tort, brought in the Municipal Court of the City of Boston by the Ideal Leather Goods Company, a Massachusetts corporation, against the Eastern Steamship Corporation, a Maine corporation and a common carrier by water.

The plaintiff's declaration consists of three counts. The first count may be disregarded, as the trial judge ruled as a matter of law that the evidence was insufficient to sustain it, and because the plaintiff in its brief states that it was waived.

The second count alleges a contract under date of July 9, 1912, to transport a case of frames to New York; that the defendant through negligence "permitted and suffered said frames to become lost in transit;" that it "failed to deliver them although demand was made upon it to do so" on or about August 1, 1912; and that it failed "to carry out or perform its part of said contract all to the great damage of the plaintiff."

The third count alleges a contract and a breach of duty in that the defendant carrier was negligent and careless in the performance of its undertaking, to the plaintiff's damage.

The defendant's answer was a general denial.

The facts found, or described in the exhibits and depositions, so far as they are material to the issue, show that on July 9, 1912, the plaintiff delivered one case of frames to the defendant at Boston for transportation by water to New York; that a non-negotiable bill of lading was issued to the plaintiff wherein the firm of Meltzer and Karron of Brooklyn, New York, were named as consignees and the destination as Brooklyn, New York; that the goods arrived and were landed in New York, but on what day, other than that it was upon a day within three or four months after shipment, neither the report nor the testimony establishes; that the consignees received no notice from the defendant of the arrival of the goods until three or four months after their shipment; and that the notice received "was a post card mailed just prior to its receipt." Before the day of shipment the plaintiff had purchased of and received from the consignees the case of frames, but for various reasons which it is unnecessary to set out, desired to return the frames and divest itself of title.

With this end in view, the plaintiff, on July 18, 1912, wrote to the consignees that it had returned the then last shipment and enclosed a copy of the bill of lading. On July 21, 1912, the consignees replied to this letter and refused to receive the goods in these terms: "If goods come back it will not be accepted here and you will be responsible for it."

So far as appears the plaintiff and the defendant had no communication with each other regarding the goods between the day of shipment and the day of the sending of the post card notice to the consignees; nor was there any letter or other communication relating to the receipt or delivery of the goods between the plaintiff and the consignees. During the latter part of November, 1912, the plaintiff stated to the defendant that it had been informed by the consignees that they had not received the goods, and inquired why they had not been delivered; and thereafter, on two other occasions, made like inquiries, which were followed on March 18, 1913, by a demand in writing for the case of frames.

It thus appears that for a period of three or four months after the day of shipment the defendant did not give notice of the arrival of the goods either to the consignees or to the consignor; nor does it appear when the goods actually arrived, or that during that interval of time either the consignees or the consignor had knowledge of their arrival.

No facts are stated in the report, or in the exhibits or depositions, upon which it can be affirmed or inferred that the delay in transportation, if there was such delay, or in giving notice of arrival, was due to any act or omission of the consignor or consignees, or was excused by any fact or circumstance which is recognized at law as a defence. The consignor, notwithstanding the letter of the consignees refusing to receive the goods, had the right, as against the carrier at least, to assume that upon notification of their arrival the consignees might decide to accept them. It owed no duty to the carrier to acquaint it (the carrier) with the contents of the letter; nor, if it had done so, would the legal duty of the carrier have been changed. Moreover the burden of proof is upon the defendant to show that the non-performance of its undertaking was for a cause which relieved it from liability. *Lewis v. Smith*, 107 Mass. 334.

As the obligation of a carrier by water continues until the giving of notice of arrival to the consignee (*Hill Manuf. Co. v. Boston & Lowell Railroad*, 104 Mass. 122, 136), it is clear that the defendant might become liable to the consignees, or to the consignor if it remained the real owner (*Sanford v. Housatonic Railroad*, 11 Cush. 155), if such a lapse of time as here intervened between the shipment and the receipt at destination, or such an interval of time occurred between the arrival and the giving of notice of such arrival to the consignees should be found to constitute unreasonable delay in transportation, in notice of arrival, or in both. As the finding of the judge of the Municipal Court was "based on acts or omissions before notice to the consignee," what acts, if any, were committed thereafter are immaterial to the issue in this case.

At the close of the evidence the defendant requested the judge to rule that "on all the evidence the plaintiff is not entitled to recover, and judgment must be for the defendant." Upon such a request no regard is had for pleading, and it is clear that upon

the facts it could not have been given rightly. *Shannon v. Willard*, 201 Mass. 377.

The defendant further requested the judge to make the following rulings: "3. On all the evidence the plaintiff is not entitled to recover on the second count of the declaration, and judgment on the second count must be for the defendant;" and "3a. On all the evidence the plaintiff is not entitled to recover on the third count of the declaration, and judgment on the third count must be for the defendant." The remaining requests for rulings are expressly waived by the defendant in its supplementary brief, in these words: "Although we considered that the lower court was in error in its decision upon these various rulings, it seemed to us best not to press them upon the court at this time, but simply to rely upon the rulings requested to the effect that upon all the evidence the plaintiff could not recover." As to these counts, it is alleged in the second that the defendant "failed . . . to carry out or perform its part of said contract all to the great damage of the plaintiff;" and in the third count, that "the defendant was negligent and careless in performing" its duty.

It seems too clear for argument that unreasonable failure to deliver, or, in the case of carriage by water, unreasonable failure to notify the consignee of arrival, is a failure "to carry out or perform" the carrier's contract. *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263. *Mansur v. New England Mutual Marine Ins. Co.* 12 Gray, 520, 526.

It also seems clear that such a failure is a breach of that duty which the law puts upon a carrier of goods by water irrespective of contract and which arises from the undertaking; and the pleader may so allege.

As to these counts, the judge could not have ruled rightly that there was no evidence to support them or that there must be a judgment for the defendant.

The question of the amount of damages is not presented. It is sufficient to say that the plaintiff was entitled to have damages, nominal or otherwise.

Order dismissing report affirmed.

The case was submitted on briefs.

W. H. Coolidge, C. A. Hight & P. E. Coyle, for the defendant.

A. J. Berkwitz, for the plaintiff.

FRANK HERSCHMAN vs. JUSTICES OF THE MUNICIPAL COURT OF
THE CITY OF BOSTON.

ABRAHAM FEINBERG'S CASE.

Suffolk. December 3, 1914. — January 11, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Bankruptcy. Pleading, Answer. Review. Equity Jurisdiction. To enjoin enforcement of judgment obtained by fraud.

A discharge in bankruptcy cannot be taken advantage of as a defence to an action of contract unless it is pleaded.

If during the trial of an action of contract against a bankrupt on a debt provable in bankruptcy, in which the defendant has failed to set up his discharge in bankruptcy which would have been a defence if pleaded, his counsel without his knowledge withdraws from the case and judgment by default is entered against him and execution issues, whereupon the judgment creditor applies under R. L. c. 168 and amendments thereof for a certificate authorizing the arrest of the bankrupt, these circumstances do not relieve the bankrupt from the consequence of failing to set up his discharge in bankruptcy as a defence to the action, and the judgment may be enforced against him by arrest.

Where the counsel for a bankrupt, after having appeared to defend an action of contract against the bankrupt, withdrew from the case without the defendant's knowledge and did not set up the defence of the defendant's discharge in bankruptcy, by reason of which the defendant without his knowledge was defaulted and afterwards was arrested on execution, *whether* the bankrupt, upon discovering what had happened in the case, could have had the judgment against him vacated upon a petition for review under R. L. c. 193, §§ 22-37, and then could have pleaded his discharge in bankruptcy, here was referred to as a question that was not passed upon; and the further question, *whether*, if the bankrupt could show that the judgment against him had been obtained fraudulently, a court of equity would enjoin the judgment creditor from attempting to enforce it, also was referred to as not passed upon.

PETITION, filed on March 10, 1914, for a writ of prohibition addressed to the justices of the Municipal Court of the City of Boston, prohibiting and enjoining them from issuing a certificate authorizing the arrest of the petitioner Herschman upon an execution obtained by the State Bank of New York in an action on two promissory notes indorsed by that petitioner, which were provable against him in bankruptcy proceedings in which the petitioner had obtained a discharge that was alleged to be a bar to the claim against him; and a

PETITION, filed on October 7, 1914, for a writ of *habeas corpus*, alleging that the petitioner Feinberg unlawfully was deprived of his liberty by the sheriff of Suffolk County upon a civil process issued by the Municipal Court of the City of Boston in poor debtor proceedings instituted by the State Bank of New York as the holder of an execution in an action upon two promissory notes indorsed by that petitioner, which were provable against him in bankruptcy proceedings in which the petitioner had obtained a discharge that was alleged to be a bar to the claim against him.

The first case, on the petition for a writ of prohibition, was reserved by *De Courcy, J.*, upon the petition and answer and an agreed statement of facts that set forth the findings of the justice, for determination by the full court.

The second case, on the petition of a writ of *habeas corpus*, was reserved by *Hammond, J.*, upon the petition and an agreed statement of facts for determination by the full court.

The facts as shown by the agreements in both cases were as follows:

On May 15, 1908, an involuntary petition in bankruptcy was filed against Feinberg. On June 2, 1908, Feinberg was adjudicated a bankrupt. The State Bank of New York was a creditor of the bankrupt Feinberg, was scheduled as such, had notice of the bankruptcy proceedings and took part therein. Some time between Feinberg's adjudication and July 13, 1909, Feinberg made an offer of composition in the bankruptcy proceedings.

On September 16, 1908, the State Bank of New York brought an action in the Superior Court for the county of Suffolk against both Feinberg and Herschman to recover upon two promissory notes. The declaration was in two counts and contained an allegation that both counts were for the same cause of action. The notes thus declared on then had not been and never thereafter were proved in any bankruptcy proceedings. Counsel representing both Feinberg and Herschman entered an appearance for them in the action at law and on October 14, 1908, filed an answer, and continued to act therein until the withdrawal of their appearance as stated below.

On December 23, 1908, an involuntary petition in bankruptcy was filed against Herschman. On January 18, 1909, Herschman was adjudicated a bankrupt. The State Bank of New York had

notice of the bankruptcy proceedings against Herschman and appeared and participated therein, but did not prove therein the notes on which the action then was pending against Feinberg and Herschman.

On July 13, 1909, the composition offer previously made by Feinberg in the bankruptcy proceedings against him was confirmed. On July 6, 1910, a composition offer previously made by Herschman in the bankruptcy proceedings against him was confirmed. On October, 13, 1911, the counsel who had appeared in the action at law for Feinberg and Herschman withdrew their appearance. Neither Feinberg nor Herschman had any actual knowledge of this withdrawal of counsel. On October 17, 1911, Feinberg and Herschman were defaulted in the action at law. Neither Feinberg nor Herschman had any actual knowledge of this default.

In April, 1912, the State Bank of New York made a motion in the action at law to amend its declaration by striking out the allegation that both counts were for the same cause of action. This motion was allowed *ex parte* as of November 6, 1911, and judgment was entered as of November 6, 1911, on the notes against Feinberg and Herschman. Neither Feinberg nor Herschman had any actual knowledge of the motion to amend, nor of the judgment, until the commencement of the poor debtor proceedings mentioned below.

Subsequently execution issued on the judgment against Feinberg and Herschman. At no time from the commencement of the action at law until the entry of the judgment and the issuing of the execution did either Feinberg or Herschman make any plea or suggestion of bankruptcy or of their discharges in bankruptcy.

On July 31, 1913, the State Bank of New York made an application to the Municipal Court of the City of Boston under the provisions of R. L. c. 168 and acts amendatory thereof and supplementary thereto for a certificate authorizing the arrest of Feinberg and Herschman on an execution issued on the judgment.

Herschman, by a motion in writing, presented to the Municipal Court of the City of Boston substantially all the facts set forth in his present petition, and asked that court to dismiss the poor debtor proceedings against him. After hearing, the Municipal Court refused to dismiss the poor debtor proceedings on

Herschman's motion and ordered Herschman to submit to an examination.

On September 4, 1914, Feinberg was defaulted in the poor debtor proceedings; a certificate of arrest issued, and Feinberg subsequently was arrested thereon.

The case was argued at the bar in December, 1914, before *Rugg, C. J., Braley, Sheldon, De Courcy, & Crosby, JJ.*, and afterwards was submitted on briefs to all the justices then constituting the court.

C. F. Eldredge, for the petitioner in the first case.

M. M. Horblitt, (J. Wasserman with him,) for the petitioner in the second case.

T. H. Bilodeau, (John Wentworth with him,) for the respondents and for the State Bank of New York, which had been given permission by the court to file a brief.

BRALEY, J. The petitioners, having effected a composition with their creditors, were released from all provable debts. Bankruptcy act, 1898, § 1 (12), §§ 12, 14, as amended by the U. S. Sts. of February 5, 1903, c. 487, and June 25, 1910, c. 412. *Turner v. Hudson*, 105 Maine, 476. The creditor at whose instigation they are being prosecuted as poor debtors under R. L. c. 168, although scheduled and notified of the proceedings in which it participated, did not prove the notes on which it has obtained judgment in an action begun after adjudication. The petitioners retained counsel, who duly appeared of record, but after the composition had been effected withdrew their appearance, and upon default judgment, after the lapse of several months, was entered as of the date of default, and execution issued. It appears that neither petitioner had actual notice of the withdrawal or of the default or of the entry of judgment and issuance of execution until after the proceedings for their arrest were begun. While conceding, that as the notes were provable debts, further proceedings would have been stayed, if the discharge had been pleaded, the respondents contend that, if before verdict or default a discharge is obtained, failure to plead it is a waiver of the defence.

The petitioners, who upon the conceded facts were not negligent, and who were unrepresented, urge that a failure to plead a certificate of discharge before judgment is, under the circumstances, excusable in equity and it now may be set up. Or that under the

provisions of § 9 a that "a bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) When issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act," they are immune from arrest.

But this section very plainly refers only to the period covered by the pendency of the bankruptcy proceedings, during which jurisdiction is conferred on the bankruptcy court to protect the bankrupt from arrest on a provable debt until a discharge has been granted or refused. *Wagner v. United States*, 104 Fed. Rep. 133. *In re Marcus*, 104 Fed. Rep. 331. *In re Fife*, 109 Fed. Rep. 880. *People v. Erlanger*, 132 Fed. Rep. 883. *In re Adler*, 144 Fed. Rep. 659. *United States v. Peters*, 166 Fed. Rep. 613. *Turgeon v. Bean*, 109 Maine, 189.

A discharge in bankruptcy, like the statute of limitations or the statute of frauds or a release under seal, to be effective must be pleaded. If at the time of adjudication or afterwards the bankrupt is sued on a provable debt, his sole remedy is to obtain a continuance, if necessary, and plead his discharge, and where this is done all further proceedings are stayed. *Dimock v. Revere Copper Co.* 117 U. S. 559. *Boynton v. Ball*, 121 U. S. 457.

It accordingly must be held that, as the court had jurisdiction of the cause of action and of the parties and the petitioners did not interpose this defence, the judgment is not open to collateral attack, and may be enforced by arrest as well as by levy upon their goods, chattels or lands. *Dimock v. Revere Copper Co.* 117 U. S. 559. *Lane v. Holcomb*, 182 Mass. 360. *Hirsh v. Beard*, 200 Mass. 569.

If the provisions of our insolvency laws, that where the debtor obtains his discharge he is forever therefore exempt from arrest or imprisonment on account of any debt or demand provable against his estate, also had enumerated bankrupts, or if we had a statute providing that, if at any time after a year had elapsed since a bankrupt was discharged from his debts he might apply upon proof of his discharge for an order directing the judgment to be

cancelled of record, a different question would be presented. R. L. c. 163, § 95. *Walker v. Muir*, 194 N. Y. 420.

Nor are we called upon to determine whether the petitioners, upon discovery of what had been done, could have had the judgment vacated by a petition for review under R. L. c. 193, §§ 22-35, and then have pleaded their discharge, or whether, if the judgment had been obtained fraudulently, a court of equity would permanently enjoin the judgment creditor from attempting to enforce it. *Brooks v. Twitchell*, 182 Mass. 443. Freeman on Judgments (4th ed.) § 489, note 3. 23 Cyc. 991, note 44. *Starr v. Heckart*, 32 Md. 267. *Manwarring v. Kouns*, 35 Texas, 171. *Park v. Casey*, 35 Texas, 536.

The petition in each case must be dismissed for the reasons stated.

So ordered.

COMMONWEALTH vs. BLANCHE ANDERSON.

Suffolk. December 3, 1914. — January 11, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Autrefois Acquit. Practice, Criminal, Dismissal of complaint, Plea in bar, Exceptions. *Evidence*, Of conversation, Admission by conduct.

A plea in bar to a complaint for keeping a common nuisance consisting of a tenement resorted to for prostitution during a period named, setting up under R. L. c. 205, § 6, an alleged acquittal upon the same charge, is not sustained by showing that a previous complaint upon a like charge covering a part of the same period was dismissed without a trial.

In a criminal case a general exception to the admission in evidence of a certain conversation cannot be sustained if a part of the conversation was admissible. If the defendant wishes to except to the admission of a part of the conversation he must state this to the presiding judge, or, after the conversation has been admitted in evidence, he can move to have the part of it which is inadmissible stricken out. An exception to the denial by the judge of a motion to strike out all the testimony relating to the conversation cannot be sustained.

At the trial of a complaint charging the defendant with keeping a common nuisance consisting of a tenement resorted to for prostitution, where there is evidence that certain police officers made statements to the defendant which if believed by the jury had a tendency to prove the offence charged and that the defendant denied these statements, and where it could be found that the defendant's denials were false and tended to show a consciousness of guilt, it is right

for the judge to instruct the jury that, if they find that the statements made by the officers to the defendant were true and that the defendant's answers to them were false, it is for the jury to determine whether such false answers were made because the defendant was conscious of guilt or for some other reason.

CROSBY, J. The defendant was convicted in the Superior Court upon a complaint charging her with maintaining a common nuisance, to wit, a certain tenement resorted to for the purposes of prostitution between November 1, 1913, and the day of making the complaint, which was January 30, 1914.

1. The defendant filed a plea in bar to the complaint on the ground that she had been previously acquitted of the same charge by the Municipal Court of the City of Boston. The Commonwealth demurred to the plea, the demurrer was sustained and the defendant was ordered to answer over, to which ruling and order she duly excepted and from which she appealed.

The record shows that on January 30, 1914, the defendant was charged in the Municipal Court of the City of Boston with maintaining a common nuisance, to wit, a house of ill fame between July 10, 1913, and January 10, 1914. To this charge she pleaded in bar a former conviction. The Municipal Court sustained the plea and dismissed the complaint on the ground that a portion of the time covered by the complaint was included in a previous complaint upon which she had been convicted.

The order sustaining the plea in bar in the second case does not in any way affect this third complaint, and so the order sustaining the demurrer to the plea in bar was correct.

The fact that this complaint covers a portion of the time included in the second complaint is immaterial. No part of the time covered by the first complaint under which the defendant was convicted is included in this complaint. The record shows that there was no trial of the second complaint upon the facts and merits, and so the acquittal of the defendant upon that charge is no bar to a subsequent prosecution and conviction under the present complaint.

"The effect of dismissing a complaint without a trial is like that of quashing or entering a *nolle prosequi* of an indictment. By neither of these is the defendant acquitted of the offence charged against him, but he is only exempted from liability on that com-

plaint or indictment." *Commonwealth v. Bressant*, 126 Mass. 246. R. L. c. 205, §§ 6, 7.

This conclusion is not at variance with *Commonwealth v. Robinson*, 126 Mass. 259, cited on the defendant's brief.

2. The record shows that one Jeremiah J. Riordan, a police sergeant, testified that he had a conversation with two police officers (Prempas and Swanson), in the presence of the defendant; that during the conversation he said to the defendant, "You are still pursuing this line of business; I have cautioned you several times, but you still persist in doing it." He further testified that during the conversation above referred to he said to the defendant: "You still persist in having these girls here; you have been doing business right along since the last time I had you in court; you have not let up a particle."

This witness also testified that he asked Officer Prempas in the defendant's presence, "What have you been doing here?" and that Prempas replied, "I came here with Officer Swanson to have a good time; this defendant opened the door and admitted us; I asked her if she had any girls in the house. . . . She said, 'The girls are out now, but I will have some presently.' She went to the telephone and telephoned a couple of numbers. . . . We sat down in the back parlor and soon two girls came in. . . . As soon as she saw the officer going toward the door, she called on the girls to 'Run, run out of the house; these are police officers.'"

Police officers Prempas and Swanson testified substantially to the conversation as recited by Sergeant Riordan. Sergeant Riordan further testified that the defendant denied each of these and all other statements and also said, "No, there never were any girls in the house." We do not recite all the conversation which Riordan testified took place in the presence of the defendant.

It appears from the bill of exceptions that before the witness Riordan testified as to this conversation the defendant objected "to the introduction of this conversation with the defendant and officers, . . . and the exception was allowed." It also appears that afterwards the defendant moved that the testimony of the witness as to the conversation be stricken out, which motion was denied and the defendant excepted.

It is plain that the evidence as to a part of this conversation was competent. If so, then the defendant's exception to its ad-

mission must be overruled. If we assume that it was incompetent so far as it was a general accusation of crime which was denied by the defendant, still that did not make the whole conversation incompetent.

We are of opinion that when the defendant said that she did not telephone for girls to come to the house; that she did not send for the girls and did not tell them to run out of the house; and that there never were any girls in the house, these statements of the officer were competent, as they called for some explanation on her part, unless she was prepared to admit the truth of the facts so stated by him. These statements were not necessarily inconsistent with innocence, but were of such a character that the defendant's denials of them were denials of facts which were relevant to the issue, although they were not a general denial of guilt and could not be so construed. As a portion of the alleged conversation was clearly admissible, the defendant's exception cannot be sustained. If she desired to except to the admission of specific parts of the conversation, it was her duty so to state to the presiding judge.

If, after the conversation was in, it appeared that a part of it was admissible and a part of it was not, the defendant could have moved to have that part of it which was inadmissible stricken out. She did not ask to have that done, but moved that all the testimony relating to the conversation be stricken out. That motion could not properly have been allowed. *Smith v. Duncan*, 181 Mass. 435.

The statements made to the defendant were not evidence of the truth of the facts so stated, but were admissible only for the purpose of enabling the jury to consider her answers and to determine whether such answers were true or false. If the jury found that the statements made by the officer were true and that her answers thereto were false, then it was for the jury to determine whether such false answers were made because she was conscious that she was guilty or for some other reason, and the judge so instructed the jury.

The defendant contends that all that was said to her by the officers amounted to an accusation of crime, namely, that she was the keeper of a house of ill fame; but this contention is not tenable. As we have pointed out, some of the statements made in the presence of the defendant and denied by her were not accusations of

crime, yet if believed by the jury, they had a tendency to prove the crime charged. The jury may have found that the defendant's denials were knowingly false and tended to show a consciousness of guilt. If so, the evidence was admissible. *Commonwealth v. Spiropoulos*, 208 Mass. 71. *Commonwealth v. Trefethen*, 157 Mass. 180, 197. See *Rex v. Christie*, [1914] A. C. 545, 554, 559, 564.

The exception to the admission of the names of the two girls seen by the officers at the defendant's house has not been argued on the defendant's brief and may be treated as waived.

Accordingly the entry must be

Appeal dismissed. Exceptions overruled.

The case was submitted on briefs.

J. P. Feeney, for the defendant.

T. D. Lavelle, Assistant District Attorney, for the Commonwealth.

JOSEPH F. COBB *vs.* CHICKATAWBUT CLUB.

Suffolk. January 11, 1915. — January 13, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Municipal Court of the City of Boston, Report to Appellate Division. *Rules of Court*.

A request under St. 1912, c. 649, § 8, for a report of a ruling of a judge of the Municipal Court of the City of Boston for determination by the Appellate Division is not "filed with the clerk within two days after notice of the ruling," as required by the statute, if it is filed on the third day after the day on which the clerk of the court delivered such notice to the attorney for the requesting party.

Under a rule adopted by the judges of the Municipal Court of the City of Boston relating to the procedure in requesting a report of a ruling for determination by the Appellate Division under St. 1912, c. 649, § 8, which rule provides that within three days "after the cause is otherwise ripe for judgment . . . the party requesting the report shall file a draft thereof," where it is shown that the cause was "otherwise ripe for judgment" on a certain day, the right to a report to the Appellate Division is lost if the draft report was not filed within three days from that date.

PETITION, filed in the Municipal Court of the City of Boston on February 27, 1913, to vacate a judgment entered in that court

against the petitioner in an action of contract brought by the Chickatawbut Club, a corporation.

The petition was denied by *Burke, J.*, and judgment was entered for the respondent on the petition. The petitioner appealed.

In the Superior Court the case was heard by *Hall, J.*, without a jury. The petitioner contended that the judgment which he sought to vacate was entered erroneously because within the required time after notice of the ruling of the judge of the Municipal Court he had filed under St. 1912, c. 649, § 8, with the clerk of that court a request for a report of the case to the Appellate Division, but that his request for a report had been denied on the ground that it had been received by the clerk one day too late.

The facts that were shown at the hearing in the Superior Court are stated in the opinion. There also was put in evidence the following rule relating to the procedure under St. 1912, c. 649, § 8, which was adopted at a meeting of the judges of the Municipal Court of the City of Boston held on September 16, 1912:

"Rule B. Reports. Within three days after the cause is otherwise ripe for judgment, or sooner if the justice whose ruling is complained of so orders, the party requesting the report shall file a draft thereof, setting forth in clear and concise terms the rulings upon which he has requested and now asks a re-hearing by the Appellate Division, the stage of the case at which, and the manner in which the same arose, how the party seeking the report claims to be prejudiced by such rulings, and any other facts essential to a full understanding of the questions presented. A hearing shall be had thereon if any party files a written request therefor. The justice shall sign such report or such amended form thereof as may be necessary to conform to the facts, or disallow the same, in either case returning the report to the clerk with his action endorsed thereon. The clerk shall forthwith give notice to the parties and upon the allowance or establishment of any report, shall enter the cause upon the list of causes ready for hearing by the Appellate Division."

At the close of the evidence at the hearing in the Superior Court the petitioner asked the judge to make the following ruling:

"On all the evidence the petitioner is entitled to have the judgment vacated and execution superseded and have said action

brought forward on the docket of the court to be tried and disposed of as if said judgment had not been rendered."

The judge refused to make this ruling. He denied the petition and found for the respondent; and the petitioner alleged exceptions.

The case was submitted on briefs.

J. F. O'Connell, J. E. O'Connell & D. T. O'Connell, for the petitioner.

A. I. Peckham, for the respondent.

BY THE COURT. This is a petition to vacate a judgment entered in the Municipal Court of the City of Boston. A decisive question is whether the petitioner seasonably asked for a report by the trial judge of that court to its Appellate Division. It is required by St. 1912, c. 649, § 8, that a party aggrieved by any ruling on a matter of law may have the ruling reported as of right, but "The request for such a report shall be filed with the clerk within two days after notice of the ruling." The record of the case in the Municipal Court showed that the defendant, who is the petitioner to vacate the judgment, filed requests for rulings on December 24, 1912, and that on December 30 the judge found for the plaintiff, the respondent to the petition, and filed a memorandum of rulings, and that judgment was entered on January 3, 1913. The ruling of the trial judge must have been made not later than December 30, 1912. The only evidence as to the time when notice of this finding and ruling was given came from a clerk of the Municipal Court, who testified that he personally delivered such notice to the attorneys for the defendant on December 31, 1912. The request for a report was filed on January 3, 1913. Manifestly this request was not filed within two days after notice of the ruling.

A rule of the Municipal Court provided that within three days "after the cause is otherwise ripe for judgment . . . the party requesting the report shall file a draft thereof." An assistant clerk of the Municipal Court testified that this cause was "otherwise ripe for judgment" on December 30, 1912. This evidence is confirmed by the transcript of the record of the case. The draft report was not filed within three days from this date.

The petitioner fails on both grounds.

Exceptions overruled.

GUISEPPE LEVERONE vs. FRANK LEVERONE.

Suffolk. January 13, 1915. — January 13, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Contract, Implied in law: common counts.

In an action of contract to recover on a *quantum meruit* for work and labor performed by the plaintiff for the defendant, where the plaintiff has testified that the defendant employed him and said to him, "I will pay you well and will satisfy you," if it appears that the plaintiff afterwards did the work required, he has a right to go to the jury, and the fact that the defendant has introduced evidence from which it can be inferred that the contract was a different one from that testified to by the plaintiff in no way deprives the plaintiff of that right.

BY THE COURT. This is an action of contract. The only question of law arises from the refusal of the trial judge to grant a request for a ruling to the effect that the plaintiff could not recover on count one of his declaration. That count was to recover a balance due on a *quantum meruit* for work and labor performed by the plaintiff for the defendant. The plaintiff testified that the defendant employed him and said, "I will pay you well and will satisfy you." Manifestly this evidence was enough to require a submission to the jury of the question whether that was the contract. Whether the plaintiff's account was correct and whether the receipt by him of numerous payments on account raised an inference of a different contract than that testified to by him were issues of fact. These exceptions appear to be frivolous. Let the entry be

*Exceptions overruled with double costs
and twelve per cent interest on the
debt from the date of the allowance
of the exceptions.*

C. F. Lovejoy, for the defendant, submitted a brief.

D. H. Fulton, for the plaintiff.

M. SUMNER HOLBROOK, trustee, *vs.* INTERNATIONAL TRUST
COMPANY.

Suffolk. October 9, 1914. — January 18, 1915.

Present: RUGG, C. J., LORING, DE COURCY, & CROSBY, JJ.

Bankruptcy. Fraud, As against creditors. Practice, Civil, Auditor's report.

The provision of the bankruptcy act of 1898, contained in § 70 e, that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication," creates no new right of the trustee in bankruptcy to avoid transfers of property made by the bankrupt but merely gives him authority to enforce the rights of creditors to avoid fraudulent transfers, if such have been made, and whether a particular transfer was or was not fraudulent as to creditors depends on the laws of the State that govern the transfer of the property in question.

In order that a transfer of property or a payment of money may be avoided as having been made with the intent to hinder and delay creditors, it is not necessary that at the time of the transfer or payment the debtor should have been insolvent. A transfer or payment may be made by a debtor, who although in financial embarrassment is not insolvent, where the attendant circumstances show an intent to delay and defraud creditors.

The rule, that a trader who does not meet his obligations as they mature in the ordinary course of business is insolvent, does not apply to persons who are not traders, and, on account of the reason which makes the rule applicable to traders, a finding of an auditor, that a firm of traders "were unable to pay their debts as they matured and became due and payable in the ordinary course of business as persons carrying on trade usually do," is evidence for a jury that a large payment of money made by this firm when they were in this condition was made with intent to hinder and delay their creditors.

In an action by a trustee in bankruptcy under § 70 e of the bankruptcy act of 1898 to recover the amount of certain payments of money made by a bankrupt firm to the defendant as having been made with the intent to hinder and delay creditors, an auditor found that "neither the firm in making these payments nor the defendant company in accepting them, thought their act morally wrong, and neither had any desire or active purpose ultimately to leave the creditors unpaid," and thereupon the auditor added, "but I rule that voluntary payments made under the circumstances here disclosed by a firm which is insolvent, that is to say not in a position to pay its bills as they mature, and without any meritorious consideration of blood or affection or as a settlement to a wife, necessarily delay, hinder and defraud its creditors." *Held*, that the auditor did not find that there was no intent to hinder and delay creditors.

Where an auditor's report is in evidence before a jury the finding of a fact by the auditor is evidence of that fact for the jury, whether the auditor was right or wrong in making the finding.

LORING, J. This is an action brought by a trustee in bankruptcy under § 70 e of the bankruptcy act of 1898,* to recover payments made to the defendant amounting to \$1,677.70. At the trial the report of an auditor was put in evidence. No other evidence was introduced by either party. The defendant asked for eighteen rulings, three of which were given by the presiding judge. Thereupon the presiding judge directed the jury to return a verdict for the plaintiff. No exception was taken to this ruling. The only exception taken was to the refusal of the judge to give the rulings asked for by the defendant.

The facts found by the auditor were in substance as follows: In June, 1903, a corporation known as the Bolles, Wilde Company borrowed of the defendant \$3,935, and pledged as security therefor two warehouse receipts and the merchandise thereby represented. It was provided in the note given by the Bolles, Wilde Company that the collateral given as security for the note should stand as security "for payment of this or any other direct or indirect liability or liabilities of ours to said trust company due or to become due." At some date (not fixed in the evidence) before August 31 of the same year (1903) a partnership known as Graves, Brown and Company took over the assets of the Bolles, Wilde Company and assumed its liabilities. On October 22 of the same year (1903) the partnership of Graves, Brown and Company made an assignment for the benefit of their creditors. The assignee continued the business for about two years. On November 22, 1905, partnership articles were signed which created a new firm of Graves, Brown and Company. It is found by the auditor that the business was carried on continuously by the assignee and the second firm of Graves, Brown and Company; that the second firm of Graves, Brown and Company began to carry on business before the partnership articles were signed, but that the time when the new firm of Graves, Brown and Company succeeded to the business could not be ascertained on the evidence. While the assignee of the first firm of Graves, Brown and Company was

* Section 70 e contains these words: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication."

carrying on the business he paid a dividend of thirty per cent to the creditors of the first firm of Graves, Brown and Company. Before that time came, the original note of the Bolles, Wilde Company for \$3,935 had been paid in order to secure a release of the goods which had been pledged as collateral security for it. When the final payment was made on that note, there were in the hands of the defendant warehouse receipts representing goods worth \$2,000. At the time of this final payment the defendant trust company had in its possession customers' notes which it had discounted for and which were indorsed by the Bolles, Wilde Company and also other customers' notes which had been discounted for and were indorsed by Graves, Brown and Company. These notes were at that time all overdue, and the auditor found that "though the fact does not clearly appear it may be inferred that at this time the Bolles, Wilde Company and Graves, Brown and Company were liable to the trust company upon the notes which each had indorsed." At the time that the assignee of Graves, Brown and Company paid the dividend of thirty per cent to the creditors of that firm, the customers' notes of both kinds held by the defendant trust company amounted to \$3,252.95. On the amount of these customers' notes of both kinds the assignee paid the defendant trust company a dividend of thirty per cent amounting to \$975.88. The check by which the \$975.88 was paid to the defendant states that it was paid "in full for all claims and demands against Graves, Brown and Company," and the defendant trust company executed an assignment to the trustee which as printed is almost unintelligible but which the auditor found covered all these customers' notes.

On September 27, 1905, shortly before the partnership articles were signed by the second firm of Graves, Brown and Company, the defendant persuaded one of the new firm to give it a note for \$2,504.80. The auditor found that "the amount of this note of September 27, 1905, (\$2,504.80) represented exactly the unpaid balance of the entire indebtedness owed by the old firm of Graves, Brown and Company to the defendant trust company at the time the assignment to Murphy was made (\$3,480.68) after deducting the amount of the dividend paid by Murphy (\$975.88)." The second firm of Graves, Brown and Company continued in business for about two years. On November 1, 1907, an involuntary peti-

tion in bankruptcy was filed against them upon which they were adjudicated bankrupt, and the plaintiff is now the trustee of their estate in bankruptcy appointed under that petition.

After the note of September 27, 1905, was given, the second firm of Graves, Brown and Company made various payments upon it, amounting to \$1,677.70. These payments were made at various dates between October 10, 1906, and October 5, 1907. The auditor found that the note of September 27, 1905, was given because the defendant trust company at which the firm kept its bank account asked for a note for the difference between the debt owed to it (including the debt of the Bolles, Wilde Company) and the dividend paid on that debt by the assignee. He further found that it was not founded on a valid consideration. This matter is dealt with at length by the auditor in his report, but, as the question before us is a question whether on the auditor's report a jury could find for the plaintiff, that part of the auditor's report need not be stated here.

The auditor further found that during the years 1906 and 1907 the firm of Graves, Brown and Company "was frequently unable to meet its bills promptly and that frequently it could not pay outstanding checks at the bank but was obliged to allow such dishonored checks to be returned." He further found that "during the years 1906 and 1907 Graves, Brown and Company were unable to pay their debts as they matured and became due and payable in the ordinary course of business as persons carrying on trade usually do."

The learned counsel for the defendant has not addressed his argument to the exceptions which were taken, but has stated that these exceptions are based upon the four contentions stated in the note.*

1. The first two contentions are founded on a misapprehension of the nature of § 70 e of the bankruptcy act. This section of the

* 1. That a trustee in bankruptcy cannot avoid a transfer of property made by the bankrupt outside of the four months' preference period on the ground that the debtor was insolvent at the time within the Massachusetts definition of the word "insolvent," unless the debtor was also insolvent at the time within the definition of "insolvent" given by the bankruptcy act.

2. That the evidence is insufficient to show that Graves, Brown and Company were insolvent at the times of the transfers within the Massachusetts definition of the word.

3. That there was sufficient consideration for the giving of the note of

bankruptcy act does not create in the trustee in bankruptcy a new right to avoid transfers of property made by the bankrupt. All that it does is to give authority to the trustee to avoid any transfers of property made by the bankrupt "which any creditor" might have avoided. It was early decided in this Commonwealth in a series of cases of which *Holland v. Cruft*, 20 Pick. 321, may be taken to be the most important, that an administrator of a deceased person (who had made a conveyance fraudulent as to creditors) might as the representative of the creditors of the deceased maintain a bill to avoid the conveyance. By § 70 e of the bankruptcy act the same result was reached by statutory enactment which was reached by judicial decision in *Holland v. Cruft*. All that § 70 e of the bankruptcy act does is to give authority to the trustee in bankruptcy to enforce the rights of creditors to avoid fraudulent transfers of property made by the bankrupt if such fraudulent transfers have been made. That is to say, the question whether a particular transfer was or was not fraudulent as to creditors under § 70 e does not depend upon the bankruptcy act but upon the laws of the State which govern the transfer of the property in question. See in this connection *In re Mullen*, 101 Fed. Rep. 413; Collier on Bankruptcy (10th ed.) 1042 g and cases cited there and in footnote 320. It follows that the definition of "insolvency" prescribed by the bankruptcy act and the definition of "insolvency" adopted by this and other courts when that word is found in the Massachusetts insolvency and other bankrupt acts, have nothing to do with this question.

The question raised by the exception to the refusal of the presiding judge to direct a verdict for the defendant is whether on the facts stated in the auditor's report the jury were warranted in finding that the payments amounting to \$1,677.70 made by the firm between October, 1906, and October, 1907, were made with intent to hinder and delay creditors of the firm. As to that question there can be no doubt. It is not necessary in order to avoid a September 27, 1905, and that the same was a valid note, and the payments made thereon cannot be recovered in this action.

4. That there was a forbearance by the defendant to sue Graves, Brown and Company for false representations in obtaining the balance of the collateral at the time of the payment of the note of June 24, 1903, and such forbearance was good consideration for the giving of the note of September 27, 1905.

transfer as a transfer made to hinder and delay creditors that the transferor at the time of the transfer was insolvent. If the circumstances are such that the jury can find that the transfer was made with intent to hinder and delay creditors it is voidable. Where a transfer is made by a debtor who is in embarrassed circumstances although not insolvent, a jury in some cases may be warranted in finding the fact of intent to delay and defraud. *Parkman v. Welch*, 19 Pick. 231. *Blake v. Savin*, 10 Allen, 340.

The reason on which it is held under the insolvency statutes of Massachusetts and under bankruptcy statutes generally that a trader is insolvent when he does not meet his obligations as they mature in the ordinary course of business is important in this case. It is important not because it is necessary to make out that Graves, Brown and Company were insolvent, but because the reason on which that rule is based is applicable here. That rule does not apply to all persons, but it does apply to traders. The reason upon which it is based and the reason why it applies to traders is that the failure to meet one's obligations as they mature in the ordinary course of business spells insolvency (at least within the meaning of that word in bankruptcy statutes) in the case of a trader, although it does not spell insolvency in case of all persons. See *Lee v. Kilburn*, 3 Gray, 594, 598-600. To the trader credit is the breath of his financial life. For that reason the fact that his obligations are not met as they mature in the ordinary course of business is more significant in case of a trader than it is in case of some other persons. In the case at bar Graves, Brown and Company must be taken on this record to have been traders. And the fact that they "were unable to pay their debts as they matured and became due and payable in the ordinary course of business as persons carrying on trade usually do" was a fact to be given its full weight by the jury in determining whether the payments made by them at that time were made with intent to hinder and delay their creditors.

The defendant has contended that the auditor found that there was in fact no intent to hinder and delay creditors. But that is not an accurate statement of his finding. The auditor first found that "neither the firm in making these payments nor the defendant company in accepting them, thought their act morally wrong, and neither had any desire or active purpose ulti-

mately to leave the creditors unpaid." Then the auditor went on in these words: "But I rule that voluntary payments made under the circumstances here disclosed by a firm which is insolvent, that is to say, not in a position to pay its bills as they mature, and without any meritorious consideration of blood or affection or as a settlement to a wife, necessarily delay, hinder and defraud its creditors." Whether the auditor was right in the ruling of law he made is not important. We refer to the finding and ruling to show that the defendant's contention is wrong that the auditor found that there was no intent to hinder and delay creditors. The finding of the auditor is that there was no intent "ultimately to leave the creditors unpaid," and that is the extent of his finding, for he immediately afterwards ruled that the payments were made with intent to hinder and delay.

2. The other two propositions on which the defendant says that its exceptions are based may be dismissed in a word. The auditor found as a fact that there was no valid consideration for the note of September 27, 1905. Whether the auditor was right or wrong in making this finding is of no consequence. The finding was evidence of the fact and the jury were warranted in adopting that finding.

Exceptions overruled.

J. R. Lazenby, for the defendant.

W. H. Powers, (*M. S. Holbrook* with him,) for the plaintiff.

PHILIP RUBENSTEIN, trustee, vs. LOUIS LOTTOW.

SAME vs. WILLIAM SEDLIS.

Suffolk. March 25, 1914. — January 20, 1915.

Present: RUGG, C. J., LORING, SHELDON, & CROSBY, JJ.

Supreme Judicial Court, Briefs. Rules of Court. Equity Pleading and Practice, Decree, Costs. Bankruptcy, Unlawful preference. Partnership. Equity Jurisdiction, Fraud, No relief from result of one's own wrongdoing. Fraud. Wrongdoer without Remedy. Conspiracy.

The provision of Rule 2 of the Supreme Judicial Court for the regulation of practice before the full court, that, "when the construction or effect of a statute

is drawn in question, so much thereof as is deemed necessary to the decision of the case shall be printed or written at length" in the briefs of the counsel, requires in a case where several sections of the bankruptcy act of 1898 are drawn in question the printing or writing in the briefs of the portions of the statute to be interpreted or applied.

The requirement of the same rule that "each party shall prepare a printed or written brief on paper of the usual quarto size" is not complied with by the presentation of a supplemental brief written on foolscap paper.

Where in a suit in equity in the Superior Court a decree is to be drawn, after a hearing of the parties and their witnesses, the decree should follow the form indicated by Equity Rule 37, and it should not be recited that the case was heard upon the "bill, . . . the answer thereto and the other pleadings," which would mean that there was no hearing on the facts.

Where two suits in equity brought by the same plaintiff against different defendants are tried together for the convenience of the court and the parties, but no order is made for the consolidation of the suits, a separate decree should be entered in each suit.

Where one of several claims of the plaintiff in a suit in equity has been disallowed, although the others have been established, it is proper in the decree either to order that the bill be dismissed so far as that claim is concerned or not to refer to it at all, instead of making an order that the plaintiff is not entitled to recover the amount of money covered by that claim.

Where costs are imposed in a suit in equity the amount of the costs that are to be paid should be stated in the decree.

A trustee in bankruptcy of the estate of a person, who was a member of a partnership until about two months before he was adjudicated a bankrupt, cannot maintain a suit in equity to recover the amount of an alleged unlawful preference where the transfer sought to be avoided was made by the partnership and not by the plaintiff's bankrupt individually, because the assets thus transferred could be recovered only for the creditors of the partnership.

In a suit in equity by the trustee in bankruptcy of a person, who was a member of a partnership until about two months before he was adjudicated a bankrupt, it was found by the trial judge that the bankrupt on the day of the dissolution of the partnership assigned to the defendant all the accounts receivable of the partnership, that at this time the bankrupt was insolvent, the partnership was insolvent and the defendant knew that both the bankrupt and the partnership were insolvent, and that the defendant then accepted the bankrupt as his debtor in place of the partnership, who owed him the money paid by the assignment of the accounts to him. At that time no other partnership creditor had accepted the bankrupt as his individual debtor. It appeared by the record that no attempt was made at the trial to go into the question whether the effect of the transfer of the accounts to the defendant would be to enable any one of the bankrupt's creditors to obtain a greater percentage of his debt than any other creditors of the same class, and no finding on this issue was made by the judge. *Held*, that so far as this issue was concerned the case should stand for further hearing and trial.

In a suit in equity by a trustee in bankruptcy to recover the amount of an alleged unlawful preference, where the plaintiff sought to recover a sum of money paid by the bankrupt to a third person with the alleged privity of the defendant, it was *said*, that under the provisions of the bankruptcy act of 1898 for the recovery by the creditors of preferences from the persons who received them, no case

had been found in which a third person had been held to be liable to repay the amount of an alleged unlawful preference merely because he was a privy to the payment; but in the present case it was unnecessary to decide this question, because the judge found on evidence that warranted such a finding that the defendant was not a privy to the alleged fraud.

The rule, that in a suit in equity a decision of the trial judge upon the facts will not be overturned unless plainly wrong, is not applicable where the findings of fact made by the judge show that he did not believe the witnesses on either side, so that his findings could not have been affected by the confidence that he reposed in the testimony of any of the witnesses that he saw and heard testify. In the present case, which was of this character, certain conclusions of fact made by the trial judge on the facts reported by him were found to be wrong.

In a suit in equity by a trustee in bankruptcy to recover the amount of an alleged unlawful preference by the assignment by the bankrupt to the defendant of certain accounts receivable, where it appears that the assignment of the accounts receivable was in part for the purpose of repaying to the defendant the amount of sums of money advanced by him for the purpose of enabling the bankrupt to continue in business for a sufficient length of time to prevent the trustee in bankruptcy, when appointed, from avoiding the assignment as a preference, this shows a fraud upon the law which entitles the trustee in bankruptcy to recover the amount of the assignment, in spite of the fact that the bankrupt may have received from the defendant the full value of the accounts assigned so that his estate was not diminished.

In such a suit, the defendant cannot be allowed to contend that, if the assignment to him of the accounts receivable thus is to be set aside as in fraud of the law, he is entitled to recover the sums of money paid by him to the bankrupt when the assignment was made; because where one has committed a fraud upon the law he has no standing in court but is left by the law without a remedy in the position in which he put himself.

One who conspired with a creditor of an insolvent person to assist such creditor to receive a preference unlawful under the bankruptcy act of 1898 is liable in a suit in equity brought by the trustee in bankruptcy of such insolvent for the amount of a sum of money collected by him which was a part of such unlawful preference.

LORING, J. The undisputed facts out of which these two suits in equity have arisen are in substance as follows.

In April, 1911, one Setlin, who theretofore had been a shipping clerk in the employ of an overall company on Hanover Street in Boston, set up in business for himself. To use his own words, the business consisted in "jobbing; children's dresses and muslin underwear." The defendant Lottow was an uncle of Setlin. His business was manufacturing "ladies' and children's dresses." He assisted his nephew Setlin in setting up in business; he sold him goods on credit and spoke a good word for him when Setlin referred persons to him. In July, 1911, Setlin took in as a partner one Smith, who was an uncle of Setlin and a brother-in-law

of Lottow. When Setlin began in April, 1911, he put \$300 into the business. It appeared from an account of stock taken at the time he took Smith into partnership that he had \$300 in the business at that time; Smith put \$300 into the business, \$75 of which was his own and \$225 of which he borrowed from Lottow. The name of the new firm was "S. & S. Manufacturing Company."

After January 1, 1912, at any rate, the business of the firm was not profitable. The firm was indebted to Lottow in a considerable sum for goods sold to the firm. On June 11, June 22, July 5 and July 25, the firm paid Lottow sums amounting to \$893.20 on account of their indebtedness to him. On July 30, 1912, the partnership was dissolved by Smith retiring from the firm. To induce him to retire Setlin paid Smith \$100 in cash and gave him his note or notes for \$200 on Lottow's agreeing to take it or them on account of his (Smith's) indebtedness to him (Lottow). All the partnership assets were assigned to Setlin, and Setlin agreed with Smith to pay all partnership debts. At the same time Setlin assigned to Lottow substantially all of the book accounts due to the partnership, amounting to \$1,673.25; he also gave to Lottow notes amounting in the aggregate to \$500. The two were equal in amount to the indebtedness theretofore due from the partnership to Lottow. Thereafter Setlin undertook to carry on the business on his own account. After June 1 Lottow sold no more goods to the firm or to Setlin, but he furnished Setlin with samples and after July 30 he filled orders taken by Setlin through the use of these samples, on Setlin's assigning to him (Lottow) the accounts due for such sale. When Setlin took over the partnership assets he had some stock on hand, and thereafter he made some purchases. Between July 30 and October 3, 1912, Lottow's clerk, Sedlis, advanced to Setlin \$723.39, on receiving from Setlin book accounts amounting to \$920.08, due for sales of goods made by Setlin after July 30, 1912. These advances were made from time to time between July 30, 1912, and October 3, 1912. Of these accounts receivable amounting to \$920.08, the judge who heard the case found that Sedlis had collected \$709.91, and that the balance of the accounts was of uncertain value.

On October 3, 1912, an involuntary petition in bankruptcy

was filed against Setlin. He subsequently was adjudicated a bankrupt, and the plaintiff, Rubenstein, was appointed trustee of his estate.

Later these two bills were brought by the trustee so appointed, one against Lottow and the other against his clerk Sedlis. The two bills in equity were tried together. The judge made findings of fact on February 27, 1913, and on July 24, 1913, a final decree was entered, a copy of which is set forth below.*

From this decree appeals were taken both by the plaintiff and by the defendants, and the case is here on the evidence taken by the commissioner when the case was heard in the Superior Court.

1. There are several matters of practice which should be dealt with at the outset. Neither brief complies with the second rule for the regulation of practice before the full court. That rule provides (*inter alia*) that: "When the construction or effect of a statute is drawn in question, so much thereof as is deemed necessary to the decision of the case shall be printed or written at length." In the case at bar several sections of the bankruptcy act of 1898 are drawn in question, and not one of them or any part of them, is printed or written in the brief filed by either party.

The same rule requires that briefs shall be printed or written on paper of the usual quarto size. The plaintiff's supplemental brief is written on foolscap paper. This is a matter of some consequence. The briefs are bound together with the record, and

* Final Decree.

"This cause came on to be heard upon the amended bill of complaint, the answer thereto and the other pleadings whereupon after hearing the parties and their witnesses it is ordered, adjudged and decreed that the respondent Louis Lottow be and he is hereby ordered to pay to the plaintiff the sum of \$1,502.03, together with interest thereon from August 1, 1912, and the further sum of \$75.00 together with interest thereon from October 1, 1912, and to transfer to the plaintiff the uncollected book accounts amounting to \$171.22 being part of the book accounts transferred by Julius Setlin to said Lottow on July 30, 1912; that the plaintiff is not entitled to recover the further sum of \$893.20 paid by the partnership of Setlin and Smith to Lottow prior to the dissolution of the partnership on July 30, 1912; that the plaintiff is not entitled to recover the amount of the book accounts transferred by Setlin to Wm. Sedlis between July 30, 1912 and October 3, 1912; or any part thereof; that costs be allowed to the plaintiff."

for that reason it is important that all should be on paper of the same size.

Other points of practice have to do with the final decree. The decree begins with a statement that the "cause came on to be heard upon the amended bill of complaint, the answer thereto and the other pleadings." But that statement is contradicted by the next sentence that "after hearing the parties and their witnesses it is ordered," etc. When a cause is heard on bill and answer the facts there alleged are admitted, as is the case where a cause is heard on demurrer. The decree should have begun with the statement that: "This case came on to be heard at this sitting and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed," etc. See Equity Rule 37.

The last part of the decree appealed from is in these words: "That the plaintiff is not entitled to recover the amount of the book accounts transferred by Setlin to Wm. Sedlis between July 30, 1912 and October 3, 1912; or any part thereof; that costs be allowed to the plaintiff." If the two suits in equity (one against Lottow and the other against Sedlis) had been consolidated so as to make one cause a single decree would have had to be entered. In that case the proper way of dealing with the matter covered by the last clause of the decree (quoted above) would have been to dismiss the bill as against the defendant Sedlis. But there was no order of consolidation of these two suits. They appear to have been tried together merely, and that without a special order. They were not consolidated; as to the difference between trying two cases together and consolidating two cases, see *Lumiansky v. Tessier*, 213 Mass. 182. The two suits having been tried together merely, a separate decree should have been entered in each.

Again, in drawing a decree, if one of several claims is not allowed, the proper way of dealing with it is to dismiss the bill so far as that claim is concerned or not to refer to it in the decree at all. The provision in the decree "that the plaintiff is not entitled to recover the further sum of \$893.20 paid by the partnership of Setlin and Smith to Lottow prior to the dissolution of the partnership on July 30, 1912," was improper.

Lastly, as was pointed out in *East Tennessee Land Co. v.*

Leeson, 185 Mass. 4, the amount of the costs which are to be paid should be stated in the decree. The proper form of a decree in equity for costs is: "The defendant or the plaintiff [as the case may be] is hereby directed to pay the defendant or the plaintiff [as the case may be] costs amounting to [naming the sum at which costs have been taxed before the decree is entered], and execution is to issue therefor."

2. The judge who heard the case found that when the payments amounting to \$893.20 were made by the firm to Lottow on account of the firm's indebtedness, the partnership was insolvent, and that this was known to or should have been known by the defendant. But the judge ruled, as matter of law, that the trustee appointed in bankruptcy proceedings against Setlin individually could not recover a preference made by the partnership. We are of opinion that the ruling was right. The preference in question was an unlawful payment of assets which did not belong to Setlin (whose trustee in bankruptcy is undertaking to recover the sums so paid), but to Setlin and Smith jointly as partners. We are not able to see how the trustee in bankruptcy of Setlin's estate can recover back property of the firm which was transferred away by the firm as an unlawful preference. The plaintiff has argued that the question is governed by the decision made in *In re Keller*, 109 Fed. Rep. 118, to the effect that a creditor of a firm who seeks to prove against the individual assets of a bankrupt continuing partner must account for a preference received from the firm before he can prove against these individual assets. That decision went on the ground that the creditor was proving as an individual creditor of the continuing partner, and if he was allowed to keep the preference made by the partnership before the dissolution he would be enabled to obtain a larger share than other creditors of the same class. That decision does not reach this case. And that was in terms pointed out by the judge in that case, at p. 122. He there said: "The question is not the one that would arise in case the trustee of Almon D. Keller should sue a third party to recover back money paid him by the firm on a firm debt on the ground that such payment was a preference."

Another ground put forward by the plaintiff is that the continuing partner has succeeded to the rights of the firm and so has

succeeded to the right to recover this preference. But the right to recover back the preference is a right of the creditors of the firm, not a right of the firm. The other contentions of the plaintiff in this connection have been answered by what has been said.

3. The judge found as a fact that when Setlin on July 30, 1912, assigned to the defendant Lottow partnership accounts receivable amounting to \$1,673.25, the partnership was insolvent, Setlin was insolvent, and the defendant knew that both the partnership and Setlin were insolvent. The judge found also that these accounts amounting to \$1,673.25 were "substantially all of the book accounts due to the partnership." It further appears that with the notes amounting to \$500 Lottow thus was paid in full for the debt due to him from the partnership. It further was found by the judge that Lottow then accepted Setlin as his debtor; and on the record it must be taken to be the fact that no other partnership creditor at that time had accepted Setlin as his individual debtor, except so far as Setlin's agreement with Smith to pay the partnership debts had the effect of creating a separate creditor of Setlin. Under these circumstances Lottow's counsel has contended that this does not make out a preference under the bankruptcy act of 1898, c. 541 (30 U. S. Sts. at Large, 544), as amended by U. S. St. 1903, c. 487, § 13. This contention is founded upon the provision of § 60 a, that to constitute a preference the transfer of property must be one which "will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditor of the same class." Lottow's argument is that he was the only individual creditor of Setlin at that time, except perhaps Smith, by reason of Setlin's promise to pay the partnership debts; that individual creditors of one partner are not creditors of the same class with partnership creditors of the firm; that Smith who cannot prove in competition with his own debtors is postponed in proof to the partnership creditors and so is in a separate class. For the proposition that partnership creditors are not of the same class as the separate creditors of the continuing partner the defendant Lottow relies on the following cases: *Miller v. New Orleans Acid & Fertilizer Co.* 211 U. S. 496, 504; *Matter of Read & Knight*, 7 Am. Bankr. Rep. 111; *Rogers v. American Halibut Co.* 216 Mass. 227; *Mills*

v. *J. H. Fisher & Co.* 159 Fed. Rep. 897; *In re Wilcox*, 94 Fed. Rep. 84; *Euclid National Bank v. Union Trust & Deposit Co.* 149 Fed. Rep. 975; *In re Janes*, 133 Fed. Rep. 912; *S. C. sub nom. MacNabb v. Bank of Le Roy*, 198 U. S. 583. It was stated in argument by counsel for the plaintiff that no attempt was made at the trial to go into the question whether the effect of the transfer of the accounts receivable amounting to \$1,673.25 would be to enable any one of Setlin's creditors to obtain a greater percentage of his debt than any other creditors of the same class. It is apparent from the record that this issue of fact was not tried out at the hearing. No finding on that issue was made by the judge. Under the findings which were made by the judge, it may be that this issue will be decisive of the validity of this assignment. Under these circumstances we are of opinion that the case, so far as this claim of the plaintiff is concerned, should stand for further hearing and trial.

4. The plaintiff has contended that he is entitled to recover from Lottow the \$100 paid by Setlin to Smith on the dissolution of the partnership. The ground of his contention is that it has been found by the judge that the firm was insolvent at that time. The plaintiff contends that the payment was a preference and that Lottow was a privy to this unlawful payment. The judge made this finding: "The evidence, however, did not warrant a finding of fact or ruling of law that Lottow was guilty of such fraud of creditors in the part he took in the transaction as to make him personally liable for the payment." We have found no case in which a third person has been held liable to repay the amount of an illegal preference because he was a privy to the payment. The statute provides that in such a case a recovery can be had from the creditor who receives the payment; U. S. St. 1898, c. 541, § 60 b; that is to say (in the case at bar) from Smith. But it is not necessary to consider what the law in that connection is, for the judge in effect has found that Lottow was not a privy to this fraud. Although on appeal the finding of the judge is open for correction, we do not think on the evidence that this finding of fact should be disturbed.

5. This brings us to a consideration of the claim of the plaintiff as to the accounts amounting to \$920.08 assigned by Setlin to Sedlis from time to time between July 30, 1912, and October 3,

1912, on receiving from him sums amounting in the aggregate to \$723.39. With respect to this the judge made the following finding of fact: "The plaintiff claims that the defendant Lottow should account to him for these book accounts on the ground that the amount advanced by Sedlis to Lottow for them was advanced by Sedlis in behalf of Lottow for the purpose of enabling Setlin to continue in business for more than four months after July 30, 1912, and in order to make the transfer of all his book accounts on that date to Lottow unassailable as a preference in bankruptcy. Sedlis was Lottow's manager. He also lent money on his own account. He never before had bought accounts. The transaction was not one which could have meant much profit, if any, to him. He received from Lottow at the times that he made payments to Setlin substantially the same amount that he paid Setlin for the book accounts. The evidence satisfied me that Sedlis's purchase of the book accounts was not a genuine business transaction, but that in purchasing them he was acting as Lottow's agent. Sedlis and Lottow both knew at the time that these book accounts were taken by Sedlis that Setlin was insolvent. The willingness of Lottow to advance these further sums, which amounted substantially to the amount of the book accounts, is consistent with his desire in good faith to help Setlin along and to keep him from bankruptcy. The evidence did not satisfy me that the amount was fraudulently advanced in order to keep Setlin from going into bankruptcy before the expiration of four months."

So far as this claim is concerned the defendant has rested upon the familiar doctrine that a decision in equity upon the facts, whether by a judge or a master, will not be overturned unless plainly wrong when it is called in question by a court which has a right to review the finding; as to which see (*inter alia*) *Sawyer v. Clark*, 214 Mass. 124, 126; *Campbell v. Lima*, 212 Mass. 11; *Flagg v. Phillips*, 201 Mass. 216; *Blossom v. Negus*, 182 Mass. 515; *Chase v. Hubbard*, 153 Mass. 91.

The foundation of that rule is that where a question of fact depends upon the credit to be given to testimony (including the credibility to be given to the several witnesses), a judge who has seen the witnesses and heard the testimony is better able to come to the correct conclusion than the court which is called upon

to review the finding on reading the testimony in print. See *Harvey-Watts Co. v. Worcester Umbrella Co.* 193 Mass. 138. If the finding here in question had been in accordance with testimony given by a witness or by witnesses and so was founded upon credit given by the judge to the witness or witnesses whom he had seen, the rule would have been applicable in its full force. But the peculiarity of this case is that the judge did not believe the testimony of any one of the material witnesses who testified on this point. Setlin, called as a witness by the plaintiff, testified directly to conversations between him and Lottow in which it was stated that the purpose of this advance of \$723.39 made by Sedlis to him (on his assigning to Sedlis the accounts amounting in the aggregate to \$920.08) was to enable him to continue in business until the four months had expired during which the preference or preferences made to Lottow could be avoided. Manifestly the judge did not believe that Setlin was a credible witness. Lottow testified that this advance was made by his clerk Sedlis against his protest and not out of his (Lottow's) money; and Sedlis testified to the same effect. But this testimony was not believed by the judge. He found on the contrary that "he [Sedlis] received from Lottow at the times that he made payments to Setlin substantially the same amount that he paid Setlin for the book accounts," and that "Sedlis' purchase of the book accounts was not a genuine business transaction, but that in purchasing them he was acting as Lottow's agent." It is manifest, therefore, that the judge did not believe either Lottow or Sedlis. This finding therefore does not come within the familiar rule relied upon by the defendant.

The question which we have to decide in reviewing on appeal this finding of fact is this: What inferences ought to be drawn, on all the circumstances of the case as disclosed in the evidence, assuming that neither Setlin, Lottow nor Sedlis were credible witnesses? What were the facts? It appeared that the dissolution of the partnership and the assignment of the partnership assets to Setlin, who undertook to go on in business alone, was an act which Lottow had (in the words of the judge) "persuaded" Setlin and Smith to perform. On the evidence the judge well might have made a stronger finding in this connection. Taking the story as disclosed in the evidence it well might have been found that

Lottow was the controlling force throughout, and that Setlin and Smith were little, if any, more than his puppets. But we proceed on the findings made by the judge.

It is to be remembered that during the months of June and July Lottow had received from the partnership what on the finding of the judge could have been avoided as unlawful preferences to the amount of \$893.20 had proceedings against the partnership been taken within four months; that as part of the dissolution of the partnership and the assignment by Smith to Setlin of all the partnership assets, Lottow received what might have been a further unlawful preference by the assignment of the partnership accounts receivable, amounting to \$1,673.25. By the payments by the firm amounting to \$893.20, and by the assignment by Setlin of the book accounts amounting to \$1,673.25, and by Setlin's notes amounting to \$500, Lottow had been paid in full. It is also to be borne in mind that at this time and during the previous months when the \$893.20 were assigned to Lottow, the partnership was insolvent and was known by Lottow to be insolvent. It is likewise to be borne in mind that after June 1, 1912, Lottow had refused to sell any more goods to the firm or later to Setlin; that (under the findings of the judge) Lottow, through his clerk Sedlis, from time to time advanced to Setlin sums amounting in the whole to \$723.39 on the assignment by Setlin of the book accounts which were the result of Setlin's sales after the partnership was dissolved; and that these accounts, amounting to \$920.08, were all or substantially all the accounts receivable resulting from Setlin's business after the partnership was dissolved. It is apparent that Lottow had at stake what were or might have been unlawful preferences amounting to \$2,566.45. He also had \$500 of Setlin's notes, which it was for his interest to have paid. Lottow admitted on the stand that he knew about the four months' rule in bankruptcy and that he was familiar with such matters; in addition to this (under the findings of the judge) Lottow and Sedlis lied on the stand as to who really made this advance of \$723.39 on the assignment to Sedlis of the subsequent accounts. The question arises why, if the transaction was as the judge found it to be (a "desire in good faith to help Setlin along and keep him from bankruptcy"), Lottow and Sedlis lied about the transaction

when on the witness stand. There would seem to be but one possible reason for Lottow and Sedlis lying about the character of these advances, and that was because they knew that if the truth about them were told they would be shown to be transactions which Lottow could not defend in court. The only apparent ground on which the advances could not be defended was because they were made to prevent these possibly illegal preferences to Lottow, amounting to \$2,566.45, from being avoided.

Under the findings made by the judge in the light of the other evidence in the case, we are of opinion that the conclusion reached by him was wrong; that the only fair inference to be made is that the purpose for which the \$723.39 was advanced by Lottow (through Sedlis) out of Lottow's money was to keep Setlin from going into bankruptcy before the expiration of four months from the time when the two unlawful preferences were made to Lottow.

The defendant has contended that on the finding of the judge as to the assignment of the accounts receivable, amounting to \$920.08, the plaintiff failed to make out either a preference or a fraudulent transfer to hinder and delay creditors. His contention is that no preference was made out because full value was handed to the bankrupt when the assignment was made and so there was no diminution in the bankrupt's estate. So far as a fraudulent transfer to hinder and delay creditors is concerned, he relies upon the cases of *Githens v. Shiffler*, 7 Am. Bankr. Rep. 453, *Coder v. Arts*, 213 U. S. 223, 241, and *Matter of Maher*, 16 Am. Bankr. Rep. 340.

But we have not undertaken to hold the defendant for the assignment of these accounts receivable, either on the ground of a preference or on the ground of a fraudulent transfer made to hinder and delay creditors. The ground on which in our opinion the plaintiff has made out a case with respect to these accounts receivable is that the defendant advanced money for the purpose of enabling Setlin, the bankrupt, to continue in business for a sufficient length of time to prevent the trustee in bankruptcy, when appointed, from avoiding the transfer as a preference. That was a fraud upon the law. We are of opinion that property assigned by the bankrupt to the defendant for the purpose of carrying into effect that fraud can be recovered back by the trustee

in bankruptcy, who would have become entitled to this property had it not been transferred to this defendant to carry out that fraud. For cases in other connections somewhat analogous in legal principle, see *Lantin v. Goodnow*, 207 Mass. 291; *Boston v. Simmons*, 150 Mass. 461; and *Graves v. Johnson*, 156 Mass. 211.

The defendant further has contended that if this fraudulent transfer is to be set aside he is entitled to recover back the sums paid by the defendant to the bankrupt when the assignment of these accounts receivable was made, on the ground that when a conveyance of property procured by fraud is rescinded, the plaintiff must return the consideration which he received for the fraudulent conveyance. It is settled that that rule does not apply in the case of a fraudulent conveyance made to hinder and delay creditors. *Holland v. Cruft*, 20 Pick. 321. *Lamb v. McIntire*, 183 Mass. 367. 20 Cyc. 638. It is also settled that that rule does not apply in an action to recover money or property transferred by way of a preference. *Denny v. Dana*, 2 Cush. 160. *Allen v. French*, 180 Mass. 487. *Bolster v. Graves*, 189 Mass. 301. *Jaquith v. Davenport*, 191 Mass. 415. *Jaquith v. Morrill*, 204 Mass. 181.

The ground on which the defendant is held liable in the case at bar is that he has committed a fraud upon the law. Where one has committed a fraud upon the law, he has no standing in court, but is left by the law without remedy in the position in which he has put himself. The latest application of that rule was in *Ewald v. Ewald*, 219 Mass. 111. There a woman had left the Commonwealth to go through a ceremony of marriage in fraud of Massachusetts laws. It was held that she could not maintain a libel for nullity of the marriage because she was asking for relief based on her own fraud. That principle applies in this case and is decisive against the defendant's having a lien upon these accounts for restitution of the sum advanced by him to the bankrupt to commit this fraud upon the law.

It is plain on the evidence that Sedlis conspired with Lottow to commit this fraud on the bankruptcy act. It follows that the plaintiff is entitled to recover from Sedlis (see in this connection *Boston v. Simmons*, *ubi supra*), as well as from Lottow these accounts amounting to \$920.08.

According to Sedlis's testimony, he collected on these ac-

counts \$597.69; there is uncollected \$271.45; and he allowed in discounts in making his collections \$50.94. On the record as it stands we do not think that Sedlis is entitled to these discounts amounting to \$50.94. The amount that the plaintiff, therefore, is entitled to recover from both defendants is \$648.63 with interest, and he is entitled to have the accounts, amounting to \$271.45, or any collections which have been made on these accounts since the date of the hearing, assigned to the plaintiff. The plaintiff is entitled to interest on the several sums collected by Sedlis from the time that they were received.

6. In the decree appealed from, Lottow was directed to pay to the plaintiff \$75 with interest from October 1, 1912. That sum however was included in the advances made by Sedlis on receiving the assignment of the accounts amounting to \$920.08, which the judge found the plaintiff was not entitled to recover. As we have held that the plaintiff can recover these accounts, he is not entitled to recover this sum.

Let the decree appealed from be vacated. Let a decree be entered in the suit brought against Lottow directing that so far as the claim of the plaintiff to recover the accounts receivable amounting to \$1,673.25 is concerned the case is to stand for further hearing and trial. And let an order be entered that the final decree, when entered, shall (1) direct the bill to stand dismissed so far as the following claims of the bill are concerned, viz.: (a) the claim to recover the sum of \$893.20 paid by the partnership to Lottow prior to the dissolution of the partnership on July 30, 1912; and (b) the claim to recover the \$100 paid to Smith at the time the partnership was dissolved; and (2) shall direct the defendant Lottow to pay to the plaintiff the sum of \$648.63 (\$597.69+\$50.94), and to assign to the plaintiff the uncollected book accounts amounting to \$271.45 (originally a part of the book accounts amounting to \$920.08 assigned to him by Setlin), or so much thereof as are then uncollected, and to pay to the plaintiff any sums collected thereon since the hearing in the Superior Court, with interest from the time or times said sum of \$648.63 and said sums collected since the hearing in the Superior Court were received, said time or times to be fixed by the Superior Court. The costs in this suit are left to be dealt with when the final decree is entered.

In the second suit a decree is to be entered directing the defendant Sedlis to pay to the plaintiff the sum of \$648.63, and to assign to the plaintiff the uncollected book accounts amounting to \$271.45 (being part of the book accounts amounting to \$920.08 assigned to Sedlis by Setlin), or so much thereof as are then uncollected; and to pay to the plaintiff any sums collected thereon since the hearing in the Superior Court, with interest from the time or times said sum of \$648.63 and said sums collected since the hearing in the Superior Court were received, said time or times to be fixed by the Superior Court; and to pay to the plaintiff his costs (naming the sum at which they are hereafter taxed); and that execution is to issue for all said sums. It is

So ordered.

The cases were submitted on briefs.

Mr. Justice Sheldon took part in this decision, the opinion having been adopted by the court on December 28, 1914, in a form which remained unchanged, although the wording of the rescripts was changed later, the final rescripts having been filed on January 20, 1915, after the resignation of Mr. Justice Sheldon.

D. A. Ellis & P. Rubenstein, for the plaintiff.

Lee M. Friedman & S. J. Freedman, for the defendants.

NELLIE M. DOANE vs. ETHEL H. GREW.

Suffolk. October 5, 1914. — January 20, 1915.

Present: RUGG, C. J., LORING, DE COURCY, & CROSBY, JJ.

Label and Slander. Evidence. To show malice, Remoteness, Presumptions and burden of proof.

The privilege which protects the former employer of a domestic servant from liability in an action for slander in answering inquiries in regard to the character and capabilities of such former servant is confined to answers that are made in good faith and without malice in fact; and such malice in fact which destroys the defence of privilege must be taken to mean that the defamatory words, although spoken on a privileged occasion, were not spoken pursuant to the right or duty which created the privilege but were spoken from some other motive.

Where the former employer of a domestic servant answers inquiries from prospective employers in regard to the character and capabilities of such former

servant, he does not perform his whole duty to the inquirer if he confines himself to facts of which he has personal knowledge or to giving information which he has investigated fully, and it is his duty to impart any material information that he has received, even if he has not attempted to investigate it at all, and he cannot be held liable in an action for slander for performing this duty in good faith; and, if he ought not to have believed the reported fact or was reckless and careless in believing it, this does not make him liable for giving in good faith the information that the needs of the privileged occasion called for.

In an action for slander evidence of a repetition in substance of the alleged slander is admissible to show malice.

In an action by a nursery maid against a former employer for alleged slander in answering inquiries in regard to the plaintiff's character and capabilities while in the defendant's employ, the presiding judge admitted evidence that the plaintiff had applied to two women for a position as nursery maid and had referred them to the defendant, and that in each case she afterwards had received word that her services were not required. This evidence was admitted by the judge solely for the purpose of showing the defendant's state of mind toward the plaintiff. Later in the trial one of the women applied to testified that she did not talk with the defendant at all, and the other of them testified that all that the defendant had said to her was that the plaintiff had been very satisfactory for two years but that the last year she had not done so well, and that this did not affect the witness in deciding not to employ the plaintiff. It was *said*, that at the time the evidence was offered it was possible that it was within the discretionary power of the presiding judge to pass upon its remoteness, so that an exception to its admission would not necessarily be sustained, but, it not being necessary to decide this question because a new trial was ordered on other grounds, it was *held*, that the evidence ought not to be admitted at the new trial.

In an action by a nursery maid against a former employer for alleged slander in answering inquiries in regard to the plaintiff's character and capabilities while in the defendant's employ, evidence, that, although the plaintiff had given the defendant a week's notice of her intention to leave, the defendant told her to "pack up and get right out as quick as you can" and later, while the plaintiff was packing, said to her, "I will call up Mr. G; I will see whether you will go or not," this can be found by the jury to have shown that the defendant was angry with the plaintiff, and such anger is sufficient evidence of malice to entitle the plaintiff to go to the jury, where she already has introduced evidence tending to show that the defendant in answering inquiries had made statements in regard to the plaintiff that were not in fact true.

In an action by a domestic servant for alleged slander in answering inquiries in regard to the plaintiff's character and capabilities, where the plaintiff contends that the defendant made the statements complained of with malice so that the defence of privilege is not available, it is wrong for the presiding judge to instruct the jury that "the burden is upon the defendant to show that [the words spoken by the defendant] were privileged words, for which she is not answerable." On the contrary, where the occasion is shown to have been a privileged one, the burden is on the plaintiff to prove malice.

TORT, with a declaration originally containing four counts for alleged slander of the plaintiff in charging her in substance with

having been, while in the employ of the defendant as a nursery maid, impertinent and unfit to take care of children and with having struck a child of the defendant, to which three other counts were added by amendment. Writ in the Municipal Court of the City of Boston dated February 24, 1911.

The defendant filed a motion for specifications, and the plaintiff filed specifications stating that the words of the defendant set forth in the first count were spoken to one Mrs. Hobart, that the words set forth in the second count were spoken to one Mrs. Benson and that the words set forth in the third count were spoken to one Mrs. Eldridge. Later the plaintiff was allowed to amend her declaration by adding the fifth, sixth and seventh counts, each referring to statements alleged to have been made to Mrs. Hobart with the intention of preventing her from hiring the plaintiff as a nursery maid to take care of children.

The defendant's answer contained a general denial, alleged that the statements made by the defendant concerning the plaintiff were true, and further alleged that any statements made by the defendant concerning the plaintiff were privileged communications made in response to inquiries for information by prospective employers of the plaintiff as a nurse for children in regard to the defendant's experience with and opinion of the plaintiff as such a nurse.

On appeal to the Superior Court the case was tried before *Bell, J.* At the close of the evidence the plaintiff waived the second, third and fourth counts of the declaration, so that the case went to the jury on the first, fifth, sixth and seventh counts, all of which referred to what was alleged to have been spoken to Mrs. Hobart.

The defendant asked the judge to order a verdict for the defendant on the grounds that the occasions on which the defendant had made statements concerning the plaintiff were privileged occasions, that the defendant's communications were privileged communications, that there was no evidence of malice on her part and that there was no evidence of damage under the first, fifth, sixth and seventh counts of the declaration. The judge refused to order such a verdict, and the defendant excepted.

The defendant then asked the judge to make the following rulings:

"1. On all the evidence the plaintiff is not entitled to recover.

"2. There is no evidence sufficient to justify a finding of malice on the part of the defendant, and, therefore, the plaintiff is not entitled to recover.

"3. There is no sufficient evidence of damage to the plaintiff under any counts of the declaration, and, therefore, the plaintiff is not entitled to recover.

"4. On all the evidence it cannot be found that any words spoken by the defendant to Mrs. Hobart prevented Mrs. Hobart from employing the plaintiff, and, therefore, the plaintiff cannot recover on the first, fifth, sixth or seventh counts of the declaration.

"5. There is no evidence sufficient to justify a finding that the statements made by the defendant to Mrs. Hobart were made maliciously or actuated by malice, and, therefore, the plaintiff cannot recover under the first, fifth, sixth or seventh counts in the declaration.

"6. The plaintiff cannot recover on the fifth count of the declaration because there is no allegation that the statements therein alleged to have been made were false.

"7. The plaintiff cannot recover on the sixth count of the declaration because there is no allegation that the statements therein alleged to have been made by the defendant were malicious.

"8. The plaintiff cannot recover on the seventh count of the declaration because there is no allegation that the statements therein alleged to have been made by the defendant were either false or malicious."

The judge refused to make any of these rulings, and the defendant excepted.

The defendant further excepted to the judge's admission of the plaintiff's testimony in regard to one Mrs. Pillsbury; to his admission of the plaintiff's testimony in regard to one Mrs. Felton; to his admission of the plaintiff's testimony in regard to Mrs. Benson and the latter's conversation over the telephone with the defendant; and to his admission of the testimony of Mrs. Eldridge in regard to her interview with the defendant. These matters are referred to in the opinion.

The defendant also excepted to the following portions of the judge's charge:

"Now there is stated . . . that if the answer is made maliciously or recklessly, it is not within the privilege."

"Well, did she honestly believe in the truth of what she had said, and was it in good faith, not recklessly and carelessly, but honestly and fairly, believing the truth of the statements as to the treatment of her child by Miss Doane?"

"We are trying the question whether Mrs. Grew, from the information which she received, if she received it from Mrs. MacMahon and her children, had such cause to believe that she might honestly and fairly believe that that was the truth, and believing it honestly and fairly to be the truth, stated it to others who made inquiries of her. If that was her position and if the story was false, she would be protected in making that statement, so it is not necessary, perhaps, in some views, for you to pass finally upon the question of whether Mrs. MacMahon's story is correct or not. In other views, it may be necessary, because if you take another view of Mrs. Grew's attitude toward it and think that her action in trusting the statement which she said was made to her by Mrs. MacMahon and the children, that her attitude in trusting to their statement was reckless or careless, then it may be necessary for you to determine whether the story was true, because if it was true, whether she testified to it recklessly or carelessly or not, there was no wrong done to the plaintiff."

"Now, the next question is, Mrs. Grew being appealed to in that way, did she make an honest, fair answer, not colored by any malice or improper feeling, for malice means, not the strong meaning that we ordinarily give to it, but it means any improper feeling, any desire to injure, any desire to do harm to any party, not colored or influenced by malice, but fair, honest truth, as she then believed it to be, without recklessness or improper carelessness or neglect."

In regard to the burden of proof the judge instructed the jury as follows: "The burden of proof is upon the plaintiff to establish the speaking of the words, and, if they were injurious to her, the burden is upon the defendant to show that they were privileged words, for which she is not answerable." The defendant did not except to this instruction.

The jury returned a verdict for the plaintiff in the sum of \$500; and the defendant alleged exceptions.

A. Whiteside, (*C. Bigelow* with him,) for the defendant.

F. J. Muldoon, for the plaintiff.

LORING, J. 1. The defendant's exceptions to the charge of the presiding judge raise questions as to a defendant's liability for false defamatory words spoken on a privileged occasion.

If the occasion on which slanderous words are spoken is a privileged one and the defendant (in saying what he said) was acting under the privilege created by the occasion, a defence is made out, even if what he said was not in fact true. Where inquiries are made as to the character and capabilities of a former servant, the occasion is a privileged one. Of that there is no question. It is the typical case of a privileged occasion.

Where the occasion is a privileged one the plaintiff can hold the defendant liable if he proves that (in saying what he said of the plaintiff) the defendant did not in fact use his privilege. That is to say: Although the defendant (in answering questions as to the character and capability of a former servant) is protected if he was "acting in *bona fide* answer to the needs of the occasion," yet if malice in fact is proved the defendant is liable. By malice in fact is meant "the wilful doing of an injurious act without lawful excuse." In this connection it means that (although the occasion was a privileged one) the defendant, in saying what he said of the plaintiff, was acting outside his privilege and not under it. To prove malice in fact (that the defendant was acting outside his privilege and not under it) the plaintiff may introduce direct evidence that the defendant made the untrue defamatory statements out of hatred for the plaintiff. That is perhaps the most common way of proving malice in fact in this connection. But it is not the only way of proving malice in fact in this connection, namely, that the defendant was acting not under, but outside, his privilege. In *Gott v. Pulsifer*, 122 Mass. 235, it was assumed that publishers of newspapers, in making statements of facts which were not true, stand on the same footing as persons asked as to the character and capabilities of a former servant. On that assumption it was there held (in effect) that, if an article in the defendant's newspaper containing an untrue statement of fact was written for the sake of writing a brilliant article in reckless disregard of the rights of the plaintiff, malice in fact was made out. It is now settled that the assumption

made in *Gott v. Pulsifer* is not law. *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, affirming *Sheckell v. Jackson*, 10 Cush. 25. But on the assumption made in *Gott v. Pulsifer*, the decision in that case is correct. So in a case where the slanderous words uttered by the defendant on a privileged occasion are based upon what he has heard, if there is great excess in repeating what he has heard there is evidence that the defendant was not acting within the privilege which the occasion gave him, but outside it. See *Clark v. Molyneux*, 3 Q. B. D. 237.

Malice in fact which destroys the defence of privilege must be taken to mean that the defamatory words, although spoken on a privileged occasion, were not spoken pursuant to the right and duty which created the privilege but that they were spoken from some other motive. See in this connection Lord Blackburn in *Capital & Counties Bank, Ltd. v. Henty*, 7 App. Cas. 741, 787. "Duty" in this connection is not confined to obligations enforced by law. Giving information as to the character and capabilities of a former servant (for example) is not a legal obligation enforced by law. The law recognizes its existence as a social obligation which cannot be performed unless it creates a privileged occasion.

It is apparent that there are many ways of proving malice in fact in this connection, and that they cannot be enumerated in advance.

It follows from what has been said that the parts of the charge to which exceptions were taken did not properly present to the jury the questions to be decided by them in this case.

But the objection to one part of the charge excepted to goes deeper than that. In one part of the charge excepted to the presiding judge in effect told the jury that the defendant was liable (in case they found that the plaintiff did not in fact abuse the defendant's child) if the defendant did not honestly believe that fact, or if believing it she did not have sufficient cause to warrant the belief but was reckless or careless in trusting to the statements made by Mrs. MacMahon and her (the defendant's) children.

When inquiry is made of a person as to the character and capabilities of a former servant, the person to whom the inquiry is addressed would not do his whole duty if he should confine his answer to facts which he knows to be facts of his own knowledge. Nor would he do his whole duty if he should confine himself to giving information which he has fully investigated. Indeed he

would fail in doing his full duty if he should omit to impart any material information which has come to him, even if he has not attempted to investigate it at all. And Bramwell, L. J., in *Clark v. Molyneux*, 3 Q. B. D. 237, 244, went even farther and laid down the proposition that "a person may honestly make on a particular [privileged] occasion a defamatory statement without believing it to be true; because the statement may be of such a character that on that occasion it may be proper to communicate it to the particular person who ought to be informed of it." The person inquired of on a privileged occasion must be fair to the person making the inquiry as well as to the person about whom the inquiry is made. Where he has information (whether it has or has not been investigated by him), it is his duty to state in answer to the inquiry that he has the information, giving it (as the defendant did in the case at bar) as information concerning a fact as distinguished from a statement of the existence of the fact. Where the person to whom the inquiry is put makes a statement that he has information as to a fact (as distinguished from a statement that the fact exists) his privilege does not depend upon whether he in good faith believes the fact or whether he ought to have believed the fact or was reckless and careless in believing the fact. Where the person to whom the inquiry is put makes that kind of answer (namely that he has information as to a fact) he does not state that the reported fact is or is not a fact or that he believes or does not believe the reported fact. The person who makes the inquiry is entitled to the information which has come to the person to whom the inquiry is addressed, and the statement that information has come to him, if honestly made in answer to the inquiry, is a privileged communication. The good faith in question in that case is not good faith in believing the fact, but good faith in giving the information that the needs of the privileged occasion call for. A charge to a jury substantially the same as the charge here in question, in a case (in its legal aspects) substantially the same as the case at bar, was held to be incorrect by the English Court of Appeal in *Clark v. Molyneux*, 3 Q. B. D. 237.

There have been a number of cases in Massachusetts in which the question of what malice in fact means (within the rule that where malice in fact is proved the defendant is liable for false

defamatory words spoken on a privileged occasion) has been discussed. See *Remington v. Congdon*, 2 Pick. 310; *Bodwell v. Osgood*, 3 Pick. 379; *Swan v. Tappan*, 5 Cush. 104; *Brow v. Hathaway*, 13 Allen, 239; *Atwill v. Mackintosh*, 120 Mass. 177; *Gott v. Pulsifer*, 122 Mass. 235; *Billings v. Fairbanks*, 139 Mass. 66; *Wright v. Lothrop*, 149 Mass. 385; *Howland v. Flood*, 160 Mass. 509; *Squires v. Wason Manuf. Co.* 182 Mass. 137; *Robinson v. Van Auken*, 190 Mass. 161; *Crafer v. Hooper*, 194 Mass. 68; *Christopher v. Akin*, 214 Mass. 332; and there may be others. The decisions actually made in these cases do not seem to be in conflict. But it is not possible to harmonize all that was said when these cases were decided. This has come, to some extent at least, from an assumption that the question for the jury in such cases is always the same. But that is not so. Given the definition which has been stated above, the exact question to be passed upon by the jury in each case depends or may depend upon the form in which the defamatory words were put by the defendant, taken in connection with the knowledge or information which the defendant had as to the matter of the defamatory statements. Take an example. Suppose that bare information of a fact had come to a defendant who was inquired of with respect to the capabilities and character of a former servant and the defendant was ignorant as to the trustworthiness of the source from which the information came; if under these circumstances he should state the existence of the fact as of his own knowledge, the question to be passed upon by the jury is a very different one from that which is presented when there is evidence that the statement made by the defendant matches exactly the information or knowledge which he had received and the accuracy of the source from which that information or knowledge came. It is manifest that there are a number of intermediate cases between these two, where there is a discrepancy between the statements made and the information and the knowledge of the defendant as to the accuracy of the information. These discrepancies between the information and the statements are put as examples of one aspect only which may give rise to differences in the exact question to be passed upon by the jury in determining whether there was or was not that malice in fact which destroys the defence of privilege although the words were spoken on a privileged occasion. No rule can be laid down in

advance to cover all cases beyond the statement of the fundamental proposition that in the case of false defamatory words spoken on a privileged occasion the defendant is not liable if he spoke the words in good faith under the right or duty which the occasion created, and that he is liable if he spoke the words from some other motive.

The cases of *Lothrop v. Adams*, 133 Mass. 471; *Brown v. Massachusetts Title Ins. Co.* 151 Mass. 127; *Fay v. Harrington*, 176 Mass. 270; and *Conner v. Standard Publishing Co.* 183 Mass. 474, relied on by the defendant, arose under St. 1855, c. 396 (and the re-enactments of that statute), which extended to civil actions for libel the provisions which theretofore had been applicable to criminal prosecutions for libel (St. 1826, c. 107, § 1; Rev. Sts. c. 133, § 6). By the original act (St. 1855, c. 396), it was provided that in a civil action for libel, truth was a defence "unless malicious intention shall be proved." The wording of the act has been changed, so that in R. L. c. 173, § 91, the provision is: "The truth shall be a justification unless actual malice is proved." These cases are not decisive here.

2. The evidence, which was excepted to, of the repetition of this (or of a substantially similar) slander made to Mrs. Eldridge and Mrs. Benson was admissible to prove malice, although it was not ground for an action because both Mrs. Eldridge and Mrs. Benson, in procuring the repetition of the slander, confessedly acted as the agent of the plaintiff and at her request. *Howland v. Blake Manuf. Co.* 156 Mass. 543. It is established at common law that repetition of substantially the same slander may be shown in evidence for the purpose of proving malice to enhance damages. *Bodwell v. Swan*, 3 Pick. 376. *Baldwin v. Soule*, 6 Gray, 321. *Robbins v. Fletcher*, 101 Mass. 115.

3. But we are of opinion that the plaintiff should not have been allowed to introduce in evidence that on applying to Mrs. Pillsbury and to Mrs. Felton for a position as nurse and on referring them to the defendant she received word in each case that her services were not required. This was admitted for the purpose of showing the defendant's state of mind toward the plaintiff and for no other purpose. But in our opinion it was too remote. While it is a possible inference from these facts (without more) that in each case the plaintiff failed to get the position because of the reference given by the defendant, that inference is so remote

that the evidence should not have been admitted. The course of the trial of this case is an example. When Mrs. Pillsbury was later put upon the stand, she testified that she did not talk with the defendant at all. Thereupon the plaintiff's counsel stated that he would take her at her word. And Mrs. Felton testified that although she did apply to the defendant all that the defendant said was that the plaintiff had been very satisfactory for two years but the last year she had not done so well; and that this did not affect her (the witness) in deciding not to employ the plaintiff. Whether the exception to the admission of this evidence would have been sustained it is not necessary to decide. It was perhaps within the discretion of the presiding judge to admit it in evidence. This evidence ought not to be admitted at the new trial which has become necessary.

4. The ruling asked for by the defendant, that there was no evidence to warrant a finding of malice on the part of the defendant, was refused rightly. The plaintiff testified that on the day on which she left the defendant (although she had given a week's notice of her intention to leave), the defendant first told her to "pack up and get right out as quick as you can, — in an hour if you can," and later (while she was packing) that the defendant said to her, "I will call up Mr. Grew; I will see whether you will go or not." One explanation of this inconsistent conduct on the defendant's part is that she was beside herself with anger. The fact that the defendant was angry with the plaintiff (if the jury adopted this explanation of the plaintiff's testimony and found that she was angry with the plaintiff) was sufficient to enable the plaintiff to go to the jury on the question whether the defendant (in making statements as to the plaintiff which were not in fact true — if the jury found that she did make statements not in fact true —) was acting under the privilege which the occasion created or outside it.

5. Although Mrs. Hobart denied it on the witness stand, the jury were at liberty to find that she refused to take the plaintiff as a nurse because of the statements made to her by the defendant. The exception taken to the refusal to give the third ruling requested must be overruled.

6. The sixth, seventh and eighth requests were aimed at the sufficiency of the fifth, sixth and seventh counts under the rule of practice applied in *Murphy v. Russell*, 202 Mass. 480. These

counts would seem to be counts for maliciously and without justifiable cause preventing the employment of the plaintiff by Mrs. Hobart under the doctrine of *Moran v. Dunphy*, 177 Mass. 485 (a case of interference with an employment actually in existence), applied to the prevention of getting employment in place of interfering with an actual employment then in existence. With the exception of one incidental reference to these counts in the charge (which is not of consequence), the case was left to the jury as an action of slander. That is to say the case in fact was left to the jury on the first count. We do not know whether the fifth, sixth and seventh counts (as distinguished from the first count) will be relied upon at the new trial. It is not necessary at this time to consider whether the allegations of these counts make out a case under the doctrine on which they seem to be founded.

7. It is necessary to state (on account of the contention made by the defendant in support of the exception to the judge's refusal to direct a verdict for the defendant) that Mrs. Hobart herself testified to some of the statements set forth in the first count.

8. The judge was wrong in charging the jury that "the burden is upon the defendant to show that they were privileged words, for which she is not answerable." If the occasion is a privileged one the burden is on the plaintiff to prove malice. *Brow v. Hathaway*, 13 Allen, 239. *Clark v. Molyneux*, 3 Q. B. D. 237. No exception was taken to this instruction, but it becomes necessary to refer to it in view of the fact that there is to be a new trial.

We believe that we have covered all the contentions made by the defendant. We make this statement in this way because the defendant has not addressed her argument specifically to the exceptions which she took. The entry must be

Exceptions sustained.

MEMORANDUM.

On the twenty-seventh day of January, 1915, the Honorable James Bernard Carroll, who had been one of the Justices of the Superior Court since December 16, 1914, was appointed a Justice of this court and sat as a single Justice at Springfield on February 1, 1915, first taking his seat with the full court at Boston on March 1, 1915.

COMMONWEALTH vs. UNITED STATES WORSTED COMPANY.

Suffolk. November 16, 1914. — February 23, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Corporation, Fee for filing certificate of increase of capital stock, Retirement of preferred stock by exchange for common.

Where a business corporation at a stockholders' meeting has passed two votes under St. 1903, c. 437, § 40, amending its articles of incorporation, one vote providing for a reduction of the authorized common stock from \$7,000,000 to \$700,000 by decimating the par value of the shares, and the other vote providing for an issue of new common stock in the amount of \$4,300,000, \$4,000,000 of which is to be given in exchange for preferred stock to be retired and \$300,000 of which is to be held in the treasury subject to the vote of the directors, and where it appears that the two votes constituted one transaction resulting in a net reduction of \$2,000,000 in the authorized capital stock of the corporation, the corporation is not required, upon filing the amendments with the Secretary of the Commonwealth in accordance with St. 1903, c. 437, §§ 41-43, to pay a fee under § 89 upon the new issue of common stock.

The result mentioned above being arrived at without regard to the proposed exchange of \$4,000,000 of common stock for a like amount of preferred stock to be retired, it does not matter whether or not § 40 authorized the corporation to convert its outstanding preferred stock into common stock.

CONTRACT by the Commonwealth against a business corporation organized under the laws of this Commonwealth on November 20, 1912, alleging that on March 26, 1914, the defendant under the provisions of St. 1903, c. 437, §§ 41, 42, filed with the Secretary of the Commonwealth an amendment to its articles of incorporation authorizing an increase of its common stock by the amount of \$4,300,000, and on that day paid to the Secretary of the Commonwealth the sum of \$150 as a filing fee; that there was due from the defendant on that day as such filing fee the sum of \$2,150; and that the defendant owes to the Commonwealth the balance of \$2,000 with interest from March 26, 1914. Writ dated May 16, 1914.

In the Superior Court the case was submitted to *Pierce, J.*, upon an agreed statement of facts, the substance of which is stated in the opinion. The judge found for the defendant, and at the request of the parties reported the case upon the pleadings and the agreed statement of facts for determination by this court.

If the finding was right, judgment was to be entered for the defendant; otherwise, judgment was to be entered for the plaintiff in the sum of \$2,000 and interest.

The case was submitted on briefs.

T. J. Boynton, Attorney General, & *A. E. Seagrave*, Assistant Attorney General, for the Commonwealth.

W. D. Turner & J. D. Colt, for the defendant.

DE COURCY, J. The agreed statement of facts shows that the defendant was incorporated on November 20, 1912, for the purpose of taking over the assets of three existing companies. Its capitalization was originally \$17,000,000, consisting of \$6,000,000 first preferred, \$4,000,000 second preferred, and \$7,000,000 common stock. Upon its incorporation the new company paid the regular fee of one twentieth of one per cent upon this capitalization, which amounted to \$8,500. Soon afterwards it was found that the assets of two of the companies which had been taken over were very much less in amount than was represented in the plan; and to meet in part the deficiency in assets thus arising it was deemed necessary and proper to reduce the total capitalization of the defendant corporation.

A stockholders' meeting was held for this purpose on March 21, 1914. The method adopted for effecting a reduction of the capital was to reduce the common stock from \$7,000,000 to \$700,000 in par value by reducing the par value of each share from \$100 to \$10, and at the same time to authorize the issue of new common stock amounting to \$4,300,000, of which \$4,000,000 was to be issued only in exchange for second preferred stock of an equal par value, and the remaining \$300,000 was to be held in the treasury, subject to the control of the board of directors. Thereafter, certificates showing both the reduction in the common stock and the authorization of the new issue were filed simultaneously in the office of the Secretary of the Commonwealth, and both votes took effect at the same instant. St. 1903, c. 437, §§ 41-43.

It was provided by § 89 of the business corporation law (St. 1903, c. 437), that "The fee for filing and recording the certificate required by section forty-two providing for an increase of capital stock shall be one fortieth of one per cent of the amount by which the capital is increased." (See now St. 1907, c. 396.) The con-

tention of the Attorney General is that under this statute the defendant became liable to the Commonwealth for a filing fee of \$2,150 on the \$4,300,000 new common stock authorized by the vote above mentioned.

It appears that when the corporation filed with the Secretary of the Commonwealth a certificate under §§ 41, 42, it paid a filing fee of \$150 on the \$300,000 of new common stock that is to be held in the treasury. As to the remaining \$4,000,000 new common stock, it seems apparent from the vote that the purpose of the corporation was to issue it only in exchange for second preferred stock of an equal par value. And the inference well might be drawn that it was intended to retire the second preferred stock so exchanged, so that there would be in fact no increase of the capital stock (except the \$300,000 above mentioned) even if the two votes of the corporation meeting should be considered as representing distinct and independent transactions.

But the short answer to the contention of the Commonwealth is that the votes of the stockholders' meeting represented in substance but one transaction. It is agreed that the result of the two votes taken together, and of the filing of the two certificates as required by the statute, was a net reduction of \$2,000,000 in the authorized capital stock of the company below what the original authorized capital had been. The sole purpose of the meeting was to reduce the capitalization. If that purpose had been embodied in a single vote and a single certificate, it would not be contended that the corporation is liable in this action. To hold it liable because two votes were used, which admittedly took effect at the same instant, would be to give consideration to the mere form and not to the substance of what the corporation was doing. The judge of the Superior Court had a right to draw inferences of fact, and he was warranted in finding that there was no increase of capital stock within the meaning of § 89. See R. L. c. 110, § 86.

In view of this conclusion it is unnecessary to consider the question raised by the Attorney General, as to whether § 40 of the statute empowers the corporation to convert outstanding second preferred stock into common stock.

In accordance with the report the entry is to be

Judgment for the defendant.

ELLEN FLANAGAN vs. FRANCIS C. WELCH & another.

SAME vs. ROBERT J. GARRITY & another.

Suffolk. November 18, 1914. — February 23, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Landlord and Tenant, Tenancy at will, Common stairway. Negligence, In maintaining common stairway.

A person, who enters into the occupation of a tenement in a building under an oral agreement for a lease, on which no action could be maintained if R. L. c. 74, § 1, cl. 4, were set up in defence, becomes a tenant at will by force of R. L. c. 127, § 3, and the terms of the oral agreement become binding on both parties to it.

Where the owner of a building promised a tenant at will occupying a tenement in the building, as a part of the oral agreement under which the tenant hired the tenement, that he would keep a stairway which the tenant was to use in the same safe condition that it was in at the beginning of the tenancy, the tenant can recover from such owner for personal injuries caused by a failure to keep the stairway in that condition.

In an action for personal injuries by a tenant at will occupying a tenement in a building of the defendant, if the plaintiff shows that the defendant promised, as a part of the oral agreement under which the plaintiff became a tenant at will, that the defendant would keep a stairway which the plaintiff was to use in the same safe condition that it was in at the beginning of the tenancy, and that the plaintiff's injuries were caused by the defendant's failure to keep the stairway in that condition, it is no defence to the action that, when the defendant made the oral agreement and also at the time of the plaintiff's injuries, the defendant had parted with the control of the stairway to the tenant of the adjoining building, which also was owned by the defendant, if the plaintiff was not informed of this fact when the defendant made the oral agreement with the plaintiff which assumed that the defendant was in control of the stairway.

The rule, now established, that common hallways and stairways of a building which is let out in offices or tenements remain in the control of the landlord for the use of his tenants and that it is his duty to each tenant to keep them in the same condition or apparent condition as to safety in which they were at the beginning of the several leases or lettings to the respective tenants, is founded on an implied agreement to that effect arising out of the necessities of the case.

Where the owner of two adjoining three story buildings, each used on the ground floor as a store and in the two upper stories for tenements, in making a lease of the whole of one of the buildings, which included the control of the stairways, reserved "the right to use in common with the lessee the entrance and stairway leading to the second story of said building," it was held, that in regard to the common use of this stairway the lessor was on the same footing as if he had been a tenant of the lessee.

The implied agreement, arising from the necessities of the case, by which a landlord remains in control of the common stairways of a building used for offices or tenements, applies where the common stairways are used by a few tenants, even if there are only two of them, as well as where they are used by a great number of tenants.

Where the owner of two adjoining three story buildings, each used on the ground floor as a store and in the two upper stories for tenements, made a lease of the whole of the second of the buildings which included the control of the stairways, reserving therein "the right to use in common with the lessee the entrance and stairway leading to the second story of said building," and where no janitor was employed to take care of the stairways, an agreement made by a tenant of the two upper stories of the first of the buildings, who made use of the stairway mentioned, with the agent of such owner, that such tenant should take turns with the tenants of the lessee of the adjoining building on the second floor of that building in washing the stairs, does not affect the control of the stairway or the liability of the person in such control for injuries caused by his failure to keep the stairway in a safe condition.

LORING, J. Welch and Bowditch (the defendants in the first action) were the owners of adjoining buildings numbered respectively 1632 and 1634 Washington Street. Each of these buildings was three stories in height. In each building the ground floor was used as a store and the two upper stories were used as tenements. On March 18, 1896, they let 1634 Washington Street to one Heffernan for a period of ten years. About two years before the expiration of this lease (namely on March 1, 1904) Welch and Bowditch made a written agreement extending it for a period of three years from the expiration of the original term. In this written extension they inserted the following reservation: "Reserving also to the lessors their heirs and assigns from this time the right to use in common with the lessee the entrance and stairway leading to the second story of said building, the entrance to which is numbered 1634 on Washington Street." On the same first of March, 1904, (and apparently as part of the same transaction,) Heffernan assigned his interest in the lease extended as aforesaid to Garrity and Pendergast (the defendants in the second action). The accident to the plaintiff herein complained of happened on February 13, 1908, that is to say it happened while the extended lease to Heffernan, assigned by him to Garrity and Pendergast and the reservation contained in the extension of that lease were in force and effect.

It appears from the bill of exceptions that, at some time before March 1, 1904, (when they extended the lease to Heffernan and

inserted in the extension the reservation stated above,) Welch and Bowditch cut a door through the wall between 1634 and 1632 Washington Street; this door connected the second floor of 1632 Washington Street with the landing at the head of the first flight of stairs in 1634 Washington Street. Although it is not in terms so stated it is a fair inference from the bill of exceptions that this was done in order to use the whole of the ground floor of 1632 Washington Street as a store. And it is plain on the bill of exceptions that the purpose of the reservation in the extension of the lease was to enable Welch and Bowditch to use the stairway of 1634 Washington Street as the access to the tenements on the second and third floors of 1632 Washington Street.

In September, 1904, (that is, some six months after the reservation made by them in their own favor for the use of the stairways in 1634 Washington Street,) Welch and Bowditch through an agent made an oral agreement for the lease to the plaintiff of the two upper stories of 1632 Washington Street. Later, the plaintiff entered under this oral agreement and occupied the second and third stories of 1632 Washington Street until some time after the accident here complained of, which (as we have said) happened on February 13, 1908.

The plaintiff testified that when she made the oral agreement for a lease of these two upper stories of 1632 Washington Street, Welch and Bowditch's agent told her that she was to use the stairway in 1634 Washington Street as the access to the two tenements let to her. She also testified that Welch and Bowditch's agent told her that they would keep the stairway for her use in as good condition as that in which it then was, and she testified that it was then in good condition. Later, according to the plaintiff's testimony, the flagging between the bottom of the stairs and the outside door became cracked and loose, and the accident to the plaintiff happened by her tripping over the loose flagging when on her way to her tenement in the evening of February 13, 1908. It appeared in the evidence that the plaintiff before February 13, 1908, had complained of the defective condition of this flagging to Welch and Bowditch's agent and to Mr. Welch himself, and that both Welch and Bowditch's agent and Mr. Welch himself had promised (on these complaints being made) that the flagging should be repaired and put in a safe condition.

It also appeared from the plaintiff's testimony that at the time of the oral agreement between her and Welch and Bowditch's agent for the lease of the two upper stories of 1632 Washington Street, the plaintiff asked the agent whether there was a janitor for the stairway and whether it would be lighted; and that the agent told the plaintiff that there was no janitor and that she would have to take turns with the tenants of 1634 Washington Street (who also used the stairway) in washing the stairway and the flagging at the bottom. He also told her that the gas light at the head of the landing was for her use as well as for the use of the tenants of 1634 Washington Street in lighting the stairway. It further appeared (although it may not be of consequence) that this gas light was turned out whenever the plaintiff lighted it, and that on her making complaint to the agent he furnished her with a lantern, which however was not used by her.

It is stated in the bill of exceptions that while both of the second and third stories of 1634 Washington Street were used as tenements the stairway here in question was used for the tenants of the second but not for the tenants of the third story of 1634 Washington Street, access to the third story of 1634 Washington Street being had by some means not disclosed in the bill of exceptions.

The first action was brought against Welch and Bowditch and the second against Garrity and Pendergast to recover for the injury received by the plaintiff on February 13, 1908. The two cases were tried together. The presiding judge directed the jury to return verdicts for both sets of defendants, and the cases are here on exceptions taken by the plaintiff to these rulings. "No question was raised as to the pleadings" and no question has been raised as to the due care of the plaintiff.

1. We are of opinion that the ruling directing a verdict for the defendants in the action against Welch and Bowditch was wrong. The agreement for a lease of the two tenements was an agreement for the sale of an interest in lands, tenements or hereditaments and so a contract on which, by reason of R. L. c. 74, § 1, cl. 4, no action could be brought. See *Miles v. Janvrin*, 200 Mass. 514, 517. But when the plaintiff entered into occupation under that oral agreement she became a tenant at will by force of R. L. c. 127, § 3, and the terms of the oral agreement creating

the tenancy at will became binding on both parties to it. See *Miles v. Janorin*, 200 Mass. 514, 518. If the plaintiff's testimony was believed by the jury, one of the terms of that oral agreement was that Welch and Bowditch were to keep the stairway which the plaintiff was to use in the same safe condition in which it was at the beginning of the tenancy. For a failure to keep the stairway in that condition the plaintiff had a right to recover. The cases are collected in *Domenicis v. Fleisher*, 195 Mass. 281.

The contention of these defendants to the contrary is based, on the fact that under the circumstances of this case the control of the stairway was in Garrity and Pendergast. It will appear later on that these defendants are right in their position that the stairway here in question was in the control of Garrity and Pendergast. But their contention (based on that position) in our opinion is wrong. Although as between Welch and Bowditch on the one hand and Garrity and Pendergast on the other hand the control of the stairway was in Garrity and Pendergast, yet that fact does not affect the agreement which Welch and Bowditch made with the plaintiff, if the jury believed the plaintiff's testimony and found that Welch and Bowditch did make the agreement to which the plaintiff testified. So far as the plaintiff was informed when she made her oral agreement with Welch and Bowditch's agent, the stairways were in their (Welch and Bowditch's) control. From what was said to the plaintiff by their agent this appeared to be the situation. Under these circumstances the fact that they were not in their control does not affect their liability under the express agreement which they had made on the assumption that they were in their control.

For these reasons the exception to the ruling of the judge directing a verdict in favor of the defendants in the first action must be sustained.

2. The ground on which Garrity and Pendergast (the defendants in the second action) contend that they are not liable for the accident to the plaintiff is that under the reservation by which Welch and Bowditch secured the right to use the stairway in question the stairway was not in their control, or at least not exclusively in their control. Their contention is that under this reservation the stairway was in the common or joint control of Welch and Bowditch and themselves.

It may be taken to be now established that common hallways and stairways of a building which is let out in offices or tenements remain in the control of the landlord for the use of his tenants, and that it is his duty to each tenant to keep them in the same safe condition or apparent condition in which they were at the beginning of the several leases to the respective tenants. See *Andrews v. Williamson*, 193 Mass. 92; *Domenicis v. Fleisher*, 195 Mass. 281.

This result is contrary to the result usually reached where one person has an easement over the land or other real property of another. The ordinary rule in such a case is that the owner of the dominant estate is bound to keep the servient estate over which he has an easement in such condition and repair as may be necessary for the exercise of the easement. *Prescott v. White*, 21 Pick. 341. *Doane v. Badger*, 12 Mass. 65. *Taylor v. Whitehead*, 2 Doug. 744. 14 Cyc. 1209. So far as we know there is but one case in which the reason for reaching the opposite result in the case of common hallways and stairways is discussed. That case is *Miller v. Hancock*, [1893] 2 Q. B. 177. In that case Bowen, L. J., laid it down, that the reason why the opposite conclusion is reached in case of common hallways and stairways is that there is an implied agreement to that effect arising out of the necessities of the case. In coming to that conclusion he proceeded upon the dictum of Lord Mansfield in *Taylor v. Whitehead*, *ubi supra*, at page 749, which was the case cited by Shaw, C. J., for the original proposition in *Prescott v. White*, *ubi supra*, at pages 342, 343.

We adopt the reasoning of Lord Justice Bowen. Adopting it, the first question in the case against Garrity and Pendergast is, whether that implied agreement will be made in favor of Welch and Bowditch in the case of the stairway here in question. We are of opinion that the way in which Welch and Bowditch came to have a right to use this stairway in common with the tenants of the second story of 1634 Washington Street is not of consequence. In other words we are of opinion that under the reservation they stand on the same footing with respect to the common use of this stairway that they would have stood on had they been tenants of Garrity and Pendergast.

The second question is whether the stairway here in question

is taken out of that rule by the fact that it was to be used by two tenants in common in place of a great number of tenants; and we are of opinion that it is not. The rule being founded on practical considerations should not be limited by nice distinctions. In our opinion it should apply in case of common stairways used by a few as well as in case of those used by many. If this conclusion is affected by it at all, it is helped by the fact that in the original lease to Heffernan assigned by him to Garrity and Pendergast the lessee agreed that he would "keep all and singular said premises in as good repair as the same are in at the commencement of said term or may be put in during the continuance thereof, reasonable use and wearing thereof and damage by accidental fire or other unavoidable casualty excepted." When this agreement was made by the lessee of 1634 Washington Street, it was an agreement by the lessee of premises to be occupied by him and his subtenants only. For that reason it was an agreement to bear the burden of the repairs like the agreements in question in *Hutchinson v. Cummings*, 156 Mass. 329, *Marley v. Wheelwright*, 172 Mass. 530, and not an agreement like the agreement of a landlord to keep common hallways and stairways in a safe condition for the use of his tenants. We are of opinion that when Welch and Bowditch obtained the right to use this stairway (which was originally for the sole use of Garrity and Pendergast and those claiming under them), the character of this agreement was not changed. In other words this agreement did not then become an agreement on the part of Garrity and Pendergast to keep this stairway in a safe condition for the use of Welch and Bowditch. The fact however that the burden of the repairs of this stairway was by force of the previous agreement to be borne by Garrity and Pendergast (if it affects the matter at all) helps the conclusion (which we have come to on the other grounds stated above) that the burden of keeping the stairway in a safe condition for the use of others, including Welch and Bowditch and their tenants, was on Garrity and Pendergast.

In our opinion the agreement made between the plaintiff and Welch and Bowditch's agent that the plaintiff and Garrity and Pendergast's tenants of the second floor of 1634 Washington Street should take turns in washing the stairway does not result in a different conclusion. Where common hallways and stairways

in buildings of a character where no janitor is employed remain in control of the landlord for the use of various tenants, the result that the landlord is bound to keep them in a safe condition is not in our opinion affected by an arrangement that they should be washed or kept clean by the several tenants in turn.

For these reasons we are of opinion that for the stairway in question Garrity and Pendergast were responsible on the same ground on which it is now established that landlords are responsible for common hallways and stairways left in their control for the use of the tenants of the building. It follows that the exception to the ruling of the judge directing a verdict for the defendants in the second action must be sustained.

The entry must be

Exceptions sustained.

The cases were submitted on briefs.

C. Toye, J. L. Keogh & S. A. Fuller, for the plaintiff.

H. C. Sawyer & W. H. Hitchcock, for the defendants Welch and Bowditch.

E. L. Logan, for the defendants Garrity and Pendergast.

DANIEL DWYER vs. BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. December 4, 1914. — February 23, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Negligence, Street railway.

A laborer in the employ of a gas company, who on a bright clear day was working in a trench only two and a half feet deep at a point between two parallel tracks of a street railway, on both of which cars were passing frequently, and was struck by a car coming from the direction in which he was facing, which he did not see because he failed to look up from his work when he heard the noise of the approaching car "coming closer and closer to him," in an action brought by him against the corporation operating the street railway to recover for his injuries thus caused cannot be found to have been in the exercise of due care.

TORT for personal injuries from being struck by a street railway car of the defendant on May 2, 1913, when the plaintiff was working as a laborer in the employ of the Cambridge Gas

Light Company in a trench about two and a half feet deep at a point between the two parallel tracks of the defendant on Huron Avenue in Cambridge. Writ dated July 21, 1913.

In the Superior Court the case was tried before *Brown, J.* At the close of the evidence, which is described in the opinion, the defendant asked the judge to order a verdict for the defendant. The judge refused to do this and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$450. The defendant alleged exceptions.

The case was argued at the bar in December, 1914, before *Rugg, C. J., Braley, Sheldon, De Courcy, & Crosby, JJ.*, and afterwards was submitted on briefs to all the justices then constituting the court except *Carroll, J.*

P. F. Drew, (W. U. Friend with him,) for the defendant.

J. H. Hurley, for the plaintiff.

DE COURCY, J. The issue of the motorman's negligence rightly was submitted to the jury. He earlier had seen the employees of the gas company excavating the trench, which extended from the sidewalk to and under both sets of tracks. He testified that as he approached it at the time of the accident he saw a man digging in a hole between the two tracks. Presumably this was the plaintiff, who was working at that place. And the jury could accept the plaintiff's statement that the car came down on him at a high rate of speed, without sounding a warning gong, and did not stop until it reached the next stopping place at Lake View Avenue.

On the issue of due care, however, the case is governed by *Quinn v. Boston Elevated Railway*, 188 Mass. 473, and *Kelly v. Boston Elevated Railway*, 197 Mass. 420. The plaintiff was working in close proximity to tracks upon which cars were frequently passing; he was fully aware in advance of the precise danger to which he was exposed and from which later he suffered, and was relying entirely on the exercise of his own faculties to guard him from injury. The trench was only two and a half feet deep. The day was bright and clear. He was facing in the direction from which came the car that struck him, and had an unobstructed view of three hundred yards. Although he heard the noise of the approaching car "coming closer and closer to him" at a high rate of speed, he did not look up from his work,

nor see the car which hit him in the side. There was nothing so unusual or urgent in the work he was doing as to justify his failure to see or hear this approaching car in time to protect himself by moving out of its path. We are of opinion that the ruling requested by the defendant should have been given. *Carney v. Boston Elevated Railway*, 219 Mass. 552.

Exceptions sustained.

HENRY GRAHAM vs. POCASSET MANUFACTURING COMPANY.

Bristol. January 13, 1915.—February 23, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Negligence, Invited person, Licensee.

Where a man, who formerly had worked in a certain mill, went there to apply to the engineer for work and by invitation entered the weave room of the mill and, after some conversation with the engineer and a weaver, started to leave the room by a door that he never had used before and which opened upon a staircase leading to a different side of the mill from the one by which he had entered, and, there being no platform at the head of these stairs but an immediate descent of seven and a half inches to the top step, he fell down the flight of stairs and was injured, in an action brought by him against the corporation maintaining the mill for his injuries thus caused, it was *held*, that there was no invitation to the plaintiff to leave the weave room by a different door from that by which he had entered it and that, when he attempted to leave in this way, he became a mere licensee to whom the defendant owed no duty to keep its premises safe or to warn him of their condition.

CROSBY, J. The plaintiff was injured by falling down a flight of stairs in the defendant's mill at Fall River. He went to the mill to apply to the defendant's overseer for work. He entered the weave room at the north or the Central Street entrance, which is practically on a level with the street. After some conversation with the overseer, the plaintiff talked with a weaver and then started to leave the mill. He went to a door on the south side of the weave room, opened the door and fell down a flight of stairs that led from the weave room on the south or Pocasset Street side of the mill. The door was on a level with the weave room floor and opened out on to the stairway. It was seven and one half inches from the weave room floor to the top riser, the tread of

which was twelve inches wide; and a person in opening the door and stepping forward would step down seven and one half inches to the top step. There was no evidence that the stairway was improperly lighted, or out of repair, or in a defective condition. The plaintiff contends that the defendant was negligent in maintaining the stairway as it was constructed without warning the plaintiff as to the manner of its construction.

While there was evidence from which a finding would have been warranted that the plaintiff was rightfully in the weave room of the defendant's mill by its invitation, still the defendant was not required to make all the exits from the weave room safe for the plaintiff's use. The evidence shows that the plaintiff never had passed through the door at the head of the stairs before the time of the accident, although he had worked in the weave room for about two weeks at a period about two years before the accident. He testified that he did not know of the existence of the stairway or what was on the other side of the door, before he fell.

The defendant was not obliged to alter the original construction of its mill, but could use it in the way for which it was designed unless in so doing it exposed persons rightfully on the premises to dangers which they had no reason to anticipate. It was the duty of the plaintiff, in leaving the weave room, to pass out by means of the Central Street entrance, the entrance which he always had used in going to and from the weave room, and not to attempt to leave by an exit which he testified he knew nothing about. There was no invitation, express or implied, on the part of the defendant or its agents, to the plaintiff to leave the premises by the door on the southerly side of the weave room, and when he attempted to leave in this way he became at most a bare licensee, as to whom the defendant owed no duty to keep its premises safe.

As was said by Barker, J., in *Cowen v. Kirby*, 180 Mass. 504, at page 506: "If without some special invitation, express or implied, a customer sees fit to pass from that part of the establishment where it is designed and expected that he shall be into other parts not designed or adapted for his use, but for the work of the place, he becomes at best a mere licensee, as to whom the owner or occupant has no duty to keep his premises safe." *Morong*

v. *Spofford*, 218 Mass. 50. *McCafferty v. Lewando's French Dyeing & Cleansing Co.* 194 Mass. 412. *Hunnewell v. Haskell*, 174 Mass. 557. *Pinney v. Hall*, 156 Mass. 225. *Gaffney v. Brown*, 150 Mass. 479. See also *Zoebisch v. Tarbell*, 10 Allen, 385.

This case is plainly distinguishable from those where a person rightfully upon the premises of another is injured by falling upon a stairway, or other place, because of darkness. See *Marston v. Reynolds*, 211 Mass. 590; *Faxon v. Butler*, 206 Mass. 500; *Wright v. Perry*, 188 Mass. 268; *Marwedel v. Cook*, 154 Mass. 235; *Currier v. Boston Music Hall Association*, 135 Mass. 414.

We are of opinion that the presiding judge rightly ruled that the defendant was not negligent in maintaining its premises as shown by the evidence, or in failing to warn the plaintiff of the condition of the premises. It therefore becomes unnecessary to consider whether there was evidence to show that the plaintiff was in the exercise of due care.

Exceptions overruled.

The case was submitted on briefs.

D. R. Radovsky, for the plaintiff.

F. R. Greene, for the defendant.

WILLIAM F. MACKERNAN, trustee, vs. EDGAR B. FOX.

Middlesex. November 13, 1914. — February 24, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Husband and Wife. Writ of Entry.

A wife, who under R. L. c. 153, § 33, has obtained a decree that she was deserted by her husband and is living apart from him for justifiable cause, by § 36 of the same chapter may convey her real property "in the same manner and with the same effect" as if she were sole.

Where a wife, who under R. L. c. 153, § 33, had obtained a decree that she had been deserted by her husband and was living apart from him for justifiable cause, in good faith conveyed certain real estate to a trustee in fee upon the trusts that he was to pay her the net income during her life and upon her death was to convey the property to her two nieces in fee simple unless otherwise directed by a written request of the grantor or by her will, and was to convey the property as the grantor might request in writing during her lifetime or

might direct and appoint by her will, it was *held*, that the trustee had a freehold estate in the property sufficient to maintain a writ of entry against the husband; as the power of revocation and appointment, if valid against the creditors of the grantor and against her husband in case he survived her, which here was not open to consideration, did not affect the present legal title of the trustee.

WRIT OF ENTRY, dated January 12, 1914, to recover six parcels of land in North Reading.

In the Land Court the case was tried before *Corbett, J.* The demandant put in evidence a certified copy of a decree of the Probate Court of the County of Suffolk dated December 12, 1910, declaring that on the petition of Mrs. Inez E. Fox of Winthrop in the county of Suffolk, wife of Edgar B. Fox of North Reading in the county of Middlesex, under R. L. c. 153, §§ 33-36, "it is hereby adjudged and determined that the said Edgar B. Fox has deserted the petitioner and that she is living apart from her husband for justifiable cause."

The demandant introduced in evidence the deeds of the premises establishing the title in Inez E. Fox of the six parcels of land and also a deed from Inez E. Fox to the demandant dated January 3, 1914, purporting to convey the demanded premises to the demandant by a quitclaim deed, using the words "remit, release and forever quitclaim." The habendum clause was as follows:

"To Have and To Hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said William F. Mackernan and his heirs and assigns, to their own use and behoof forever, *in trust* nevertheless to and for the following uses, intents and purposes hereinafter mentioned, namely: *First*; in trust to receive, hold, manage, control, use and occupy the same and to collect the rents, issues and profits, derived or accruing therefrom; and out of the same to keep the premises in good repair, properly insured, and to pay all taxes and charges imposed thereon. *Second*; in trust to pay over the net rents, issues, and profits derived or accruing therefrom to the grantor for and during the term of her natural life. *Third*; in trust to convey in fee simple said premises upon the decease of the grantor to Florence L. Campbell and Inez E. Campbell of said Chelsea, nieces of said grantor, as tenants in common, unless otherwise directed either by written request made by the grantor to the

grantee during said grantor's lifetime or as the grantor may direct and appoint in her last will and testament. *Fourth*; in trust to convey in fee simple said premises to such person or persons as the grantor may by written request made to the grantee during her lifetime or by her last will and testament direct and appoint. Upon the conveyance of said premises in accordance with the terms of this instrument this trust shall thereupon immediately terminate and the grantee by the acceptance of this deed doth hereby signify his acceptance of this trust and doth hereby agree to faithfully discharge and execute the same according to the true intent and meaning of these presents."

At the close of the evidence the tenant asked the judge to find that the demandant had not proved a title in himself to the demised premises equal to a freehold estate, as required by R. L. c. 179, and that the powers vested in the demandant by the deed referred to were not such an interest in fee as to entitle him, as trustee or otherwise, to maintain a writ of entry.

The judge refused to make this finding. He found for the demandant and ordered that judgment be entered for him. The tenant alleged exceptions.

The case was submitted on briefs.

W. B. Grant & S. Bancroft, for the tenant.

W. F. Porter, for the demandant.

DE COURCY, J. The title to the property in question was in Inez E. Fox, the wife of the tenant Edgar B. Fox. By the decree of the Probate Court dated December 12, 1910, on her petition under R. L. c. 153, § 33, it was adjudged that her husband had deserted her, and that she was living apart from him for justifiable cause. By virtue of § 36 of the statute she was thereafter free to convey her real property "in the same manner and with the same effect" as if she were sole.

The deed by which she conveyed the property to the demandant "and his heirs and assigns" was in the ordinary quitclaim form and vested in him the legal title in fee, but upon certain trusts. So far as now directed he is to pay over the net income to her during her life, and upon her decease is to convey the property to her two nieces in fee simple. Plainly he has an estate of freehold sufficient to prosecute a writ of entry; and her motive in making the conveyance is immaterial. R. L. c. 179, §§ 1, 4.

Packard v. Old Colony Railroad, 168 Mass. 92. *Cleveland v. Hallett*, 6 Cush. 403. *Curtis v. Galvin*, 1 Allen, 215. See *Fay v. Taft*, 12 Cush. 448.

The tenant's attack is directed against the validity and effect of the provisions in the deed by which Mrs. Fox may direct the trustee to convey the property to another during her lifetime, or to transfer it after her decease as she shall appoint by her last will. This does not purport to affect the nature of the estate conveyed to the trustee, but only to render defeasible the remainder in fee given to the nieces. *Whipple v. Fairchild*, 139 Mass. 262. The power of revocation does not affect the present legal title in the demandant. *Stone v. Hackett*, 12 Gray, 227.

It is unnecessary to consider the validity of these provisions as against creditors of Mrs. Fox, or as affecting possible future rights of her husband Edgar B. Fox in the event of his surviving her. See *Crawford v. Langmaid*, 171 Mass. 309; *Kelley v. Snow*, 185 Mass. 288; *McEvoy v. Boston Five Cents Savings Bank*, 201 Mass. 50; *Russell v. Webster*, 213 Mass. 491. No such issue is open to the tenant in these proceedings, especially in view of the statement in the decision of the Land Court that "no evidence of fraud in the conveyance of the property was introduced;" and we express no opinion thereon.

Exceptions overruled.

IDA S. DAVIES vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 19, 1914.—February 24, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, Street railway, Res ipsa loquitur.

Evidence, from which it can be inferred that the wooden pole supporting the hanging straps on one side of a street railway car having longitudinal seats broke under the strain put upon it by the sudden stopping of the car with a severe jerk when the car was crowded with passengers, so that either the pole or a man whose weight was supported by one of the straps fell on a woman passenger and injured her, warrants a finding that the pole was in a defective condition that rendered it unsafe for the purpose for which it was used and that the corporation operating the railway should have discovered and remedied this condition before subjecting the pole to so sudden and severe a strain.

TORT for personal injuries sustained by the plaintiff on October 25, 1911, when she was travelling as a passenger on a street railway car operated by the defendant. Writ dated January 22, 1913,

In the Superior Court the case was tried before *Lawton, J.* At the close of the evidence, which is described in the opinion, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

E. V. Grabill, for the plaintiff.

E. P. Saltonstall, (*C. W. Blood* with him,) for the defendant.

DE COURCY, J. There was evidence tending to show the following facts. At the corner of Washington and Summer Streets in Boston, about five o'clock in the afternoon of October 25, 1911, the plaintiff became a passenger on an Ashmont and Milton car of the defendant. The seats extended longitudinally along each side of the car, and the plaintiff sat in the third place on the left as she entered. The car was crowded, and many passengers were standing. Directly in front of her stood a man, hanging on to one of the straps which were attached to a pole running along the car near the roof. Whenever the car came to a stop, it did so with a jerk, and there was a very severe one at the time of the accident.

The plaintiff was struck on the left side of her neck by a heavy weight, was knocked over into the lap of a woman who sat beside her, and was seriously injured. After the accident she noticed that the pole to which the straps were attached was broken, that the section of it over her head was completely gone, and in the bracket at the right of the space where that section had been there was a splinter about an inch long and an eighth or a quarter of an inch thick.

The plaintiff was not acquainted with any one on the car. On alighting she was accompanied by one Margaret Regan, who had heard a scream at the time of the accident, had observed the excitement in the car, and had noticed the indications of suffering on the plaintiff's face. This witness also corroborated the plaintiff's testimony that the conductor spoke to her (the plaintiff) twice. The witnesses called by the defendant at the trial did not include the conductor, nor any of the passengers.

We are of opinion that the evidence, with the reasonable in-

ferences therefrom, entitled the plaintiff to go to the jury on the first count. It tended to show that the pole broke under the strain put upon it by the stopping of the crowded car with a severe jerk and that either the pole, or the man whose weight was suspended from it, came down upon and injured the plaintiff. The jury would be warranted in concluding that the breaking of this appliance of the car under such circumstances, without any explanation to account therefor, was due to a defective condition which rendered it unsafe for the purpose for which it was being used. And they could find that the defendant should have discovered and remedied this condition before subjecting the pole to so sudden and severe a strain; and that its failure to do so constituted a breach of the duty which a common carrier owes to its passengers. The evidence offered by the defendant tended to show that no such accident was reported to it, and that a wooden strap hanger never had been known to break on one of its cars. But the weight of this testimony was for the jury. *Whitney v. Boston Elevated Railway*, 208 Mass. 115. *Golden v. Mannex*, 214 Mass. 502. *Callahan v. New England Telephone & Telegraph Co.* 216 Mass. 334.

Exceptions sustained.

ALBERT W. LOCKE vs. ROYAL INSURANCE COMPANY, Limited.
SAME vs. COLUMBIA INSURANCE COMPANY.

Suffolk. November 20, 1914. — February 24, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Insurance, Fire. Contract, What constitutes. Automobile.

In an action on a policy of fire insurance to recover for the loss by fire of an automobile, which was described in the application and the policy by the name of its manufacturer, its factory number, its type of body, its number of cylinders, its horse power and other matters, and as being of the "year model 1908," where it appeared that the car in question was destroyed by fire and that it was worth and cost the plaintiff more than the amount for which it was insured and it was admitted that the description of the car in all respects other than the year model was correct, the defendant contended that the car was of the year model 1907 or 1906, and that the policy was invalid, either because the minds of the parties never met in regard to the terms of the policy, or that, if they did,

the contract was rendered void by the plaintiff's misrepresentation of a material fact. There was evidence that the car insured was in fact of the year model 1908, and there also was evidence that, if the car had been represented to be of the year model 1907 or 1906, the rate of insurance would not have been different, and that the designation of the car as being of the year model 1908 was an immaterial item in an otherwise correct description of an automobile that was known and identified by its factory number. *Held*, that the case properly was submitted to the jury.

TWO ACTIONS OF CONTRACT on fire insurance policies by the same plaintiff against different insurance companies, the first action for the loss by fire of a certain Fiat automobile, and the second action for the loss by fire of two Hotchkiss automobiles, all three of the automobiles having been described in the applications and policies, among other matters of description, as being of year model 1908. Writs dated December 20, 1912, and June 5, 1913.

In the Superior Court the cases were tried before *Stevens, J.* At the close of the evidence, the material portions of which are described in the opinion, both defendants asked the judge to rule that upon all the evidence the plaintiff could not recover. The judge refused to make this ruling. The defendant Royal Insurance Company, Limited, also asked the judge to make the following rulings:

"6. The plaintiff cannot recover if he fails to prove by a fair preponderance of the evidence that the car in question was of the model of 1908.

"7. If the model of the car in question was 1907 and the policy alleged to have been issued described the car as a 1908 model, then there was such a misdescription of the car as would prevent the policy attaching to the risk and the plaintiff cannot recover."

The defendant Columbia Insurance Company also asked the judge to make the following rulings:

"9. The plaintiff cannot recover if he fails to prove by a fair preponderance of the evidence that the cars in question were of the 1908 model.

"10. If it appears that the model of the cars in question were of an earlier model than 1908 and the policies in question described the cars as 1908 models then there is such a misdescription of the cars as would prevent the policies attaching to the risks and the plaintiff cannot recover."

The judge refused to make any of these rulings except so far as they might be embodied in his charge. He submitted the cases to the jury, who in the first case returned a verdict for the plaintiff in the sum of \$1,585.75 and in the second case returned a verdict for the plaintiff in the sum of \$2,519.41. The defendants alleged exceptions to the judge's refusal to make the rulings requested, including also exceptions to certain portions of the judge's charge and to rulings as to evidence which were not argued.

F. W. Brown & W. L. Came, for the defendants, submitted a brief.

C. H. Donahue, for the plaintiff.

DE COURCY, J. These two actions, tried together, are based on three insurance policies. That issued by the Royal Insurance Company was in the non-valued form for \$1,500 on a Fiat automobile. The others were valued policies issued by the Columbia Insurance Company, one for \$1,800 on a Hotchkiss automobile, the other for \$650 on another Hotchkiss car. It is not now questioned that the cars were destroyed by fire and that they were worth, and cost the plaintiff, more than the amounts for which they were insured. There was evidence that the plaintiff complied with the various provisions of the policies, including proofs of loss; and the requirement as to arbitration was waived.

The substantial issue raised by the exceptions is based upon an alleged misdescription of the automobiles in the applications and policies, with reference to the year model. The correctness of the description in all other respects, such as the factory number, type of body, number of cylinders, horse power, etc., is apparently conceded. The contention of the defendants is that the Fiat car was in fact of the year model 1907, and that the two Hotchkiss cars were of the year model 1906. They urged that this alleged misdescription constituted a defence to the actions as matter of law.

This defence was presented in two aspects: first, and mainly, as supporting the claim that the minds of the parties never met in consummation of the alleged contract of insurance, and that consequently the policies never attached to the risk; second, assuming that the minds of the parties did so meet, that the contract was rendered void by the plaintiff's misrepresentation of

material facts. We do not understand that the defendants urge the latter ground in this court, and we shall not consider it further. Apparently the trial judge instructed the jury on this point in the form requested by the defendants, notwithstanding that the only answer of the Columbia Insurance Company was a general denial. See St. 1907, c. 576, § 21; *Barker v. Metropolitan Life Ins. Co.* 198 Mass. 375.

One answer to the defendants' main contention is that there was evidence for the jury that the automobiles in fact were described correctly in the applications and policies. The plaintiff, who qualified as an expert, testified without objection to his belief that "the Hotchkiss cars were put out in 1908," that the Fiat car was a 1908 model, and that he thought the three cars were of the year model 1908. In the next place, 1908 was specified, not as the "year of manufacture," but as the "year model." They were all foreign cars. There was evidence that foreign makers do not make distinct yearly models, as American manufacturers do, and that at that time European cars used to be designated as 1905-1906, 1906-1907, etc., and not by single years. There also was testimony that the difference between a Hotchkiss 1906 and a 1908 car would be hardly discernible, and that a Fiat car of 1907 and one of 1908 were substantially identical. So far as the cases involve the identification of the automobiles insured, the jury could find that the minds of the parties were in accord. *Fall River v. Aetna Ins. Co.* 219 Mass. 454.

Even if it be assumed that the jury properly could not find that the automobiles were described correctly as of year model 1908, it does not follow, as matter of law, that the policy did not attach. Where, as here, there were many accurate terms of description, including the individual one of the factory number, the jury well might find that the minds of the parties met, notwithstanding an incorrect description as to one fact, if they found that that fact was not material. See *Hecht v. Batcheller*, 147 Mass. 335, 338; *Everson v. General Accident Fire & Life Assurance Corp.* 202 Mass. 169, 173. There was evidence tending to show that the alleged misstatement as to the year model did not increase the risk of loss, and hence was not material. This distinguishes the cases from those like *Bowditch v. Norwich Union Fire Ins. Co.* 193 Mass. 565, and *Harris v. St. Paul Fire*

& Marine Ins. Co. 126 N. Y. Sup. 118. Without reciting this evidence in detail, the testimony of the plaintiff's witnesses, and the rate sheets issued by the insurance companies, indicated that there would have been no increase of premium if the cars in question had been made in the earlier years, as claimed by the defendants. The list price of each of the cars in question was more than \$3,500. The premiums for insurance on the higher priced cars seem to depend on the original list price, and the amount of insurance; and the year model would not make any difference so far as the "Insurance Rates" table shows. The "Instructions and Limits" restricting the amount of insurance to be written, apparently do not limit the amount for which such higher priced cars may be insured, except that the amount must not be more than the actual value, and probably not more than the cost of the automobile to the assured. In other words there was evidence for the jury that no greater premium would be charged for a Fiat 1907 than for a Fiat 1908 car, and that hence the misstatement, if made, did not increase the risk of loss and was immaterial. The Hotchkiss cars were insured as "Dealers' Automobiles," and admittedly the rate was properly determined by adding one per cent to the basis rate for new cars, and did not depend upon their age. Further, although the agents testified that they would not have issued the policies at all if they thought that the cars were 1906 or 1907 model, the jury could find, in view of the rate sheets and other testimony, that only in the case of the cheaper cars of model before 1909 did the company reserve the right to accept the risk "only after the receipt of application with full particulars." They may have been content in the case of the higher priced cars with the protection afforded by the provision that the "amounts to be insured must not be more than actual value."

The rulings requested by the defendants were refused rightly. As already stated, there was evidence for the jury that the alleged misstatements as to year model were not made in fact, and further, that, even if made, they were in the nature of an immaterial description of automobiles which were known and which were identified by their individual factory numbers. The weight of the evidence was for the jury to determine. The charge was sufficiently favorable to the defendants and embodied their re-

quests with reference to misrepresentations and to the attaching of the policies, which were based upon the evidence they offered. The exceptions to portions of the charge, and those relating to evidence have not been argued. We have examined them, however, and discover no error.

Exceptions overruled.

NEW ENGLAND CONCRETE CONSTRUCTION COMPANY vs. SHEPARD
AND MORSE LUMBER COMPANY.

Suffolk. November 30, 1914. — February 24, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Contract, Performance and breach, Construction.

In an action against a lumber company for the non-performance of a contract to manufacture and furnish for delivery on a certain day fifty-eight thousand feet of maple flooring, where the contract contains a provision that "All contracts are contingent upon strikes, fires, breakage of machinery, perils of navigation and all other causes beyond our control," and it is found on evidence warranting such a finding that time was an essential part of the contract, proof by the defendant of the destruction of its lumber mill by fire which made impossible the performance of the contract in accordance with its terms is a complete defence to the action; the contract not being an absolute one to furnish the flooring to the plaintiff but only a contract to furnish it if certain contingencies did not occur, including the contingency of fires, and there being no obligation upon the defendant to show that the fire that destroyed the mill was beyond its control, the words "beyond our control" in the clause above quoted referring to the words "other causes" immediately preceding them and not limiting the contingency of fires. /

CROSBY, J. The contract upon which this action is brought arises from certain letters and an "order slip" delivered to the plaintiff by the defendant. By the terms of the contract the defendant agreed to manufacture and furnish the plaintiff fifty-eight thousand feet of No. 1 maple flooring, in accordance with certain specifications, for the sum of \$37.50 per thousand, delivered at Salem, Massachusetts. "Delivery to be made about June 1, next."

The defendant, in its letter to the plaintiff dated January 14, 1913, states: "We will forward the order to our Burlington,

Vermont, mill and will make preparations to have it filled as requested." The fair inference from this evidence is that the flooring so to be furnished by the defendant was to be manufactured by it at its mill in Burlington, Vermont; at least the presiding judge before whom the case was tried without a jury could have found so.

The contract contained a further provision that "All contracts are contingent upon strikes, fires, breakage of machinery, perils of navigation and all other causes beyond our control." The evidence shows that on February 19, 1913, and before any of the flooring had been manufactured or delivered to the plaintiff, the defendant's mill at Burlington was destroyed by fire; that the defendant duly notified the plaintiff by letter of that fact and of its inability for that reason to carry out the contract.

The agreement is not an absolute contract by which the defendant agreed to furnish the flooring to the plaintiff, but was subject to certain conditions, including the condition that the contract was contingent upon fires; that is to say, the defendant was excused from performance in the event of the happening of any of the contingencies set forth in the contract. *Davis v. Columbia Coal Mining Co.* 170 Mass. 391.

The effect of this clause was not to extend the time of performance beyond the time limit, but wholly to relieve the plaintiff from the obligation to furnish the flooring called for by the contract. *Metropolitan Coal Co. v. Billings*, 202 Mass. 457, 462.

The plaintiff contends that the word "fires" in the clause in question is to be construed in connection with the phrase "and all other causes beyond our control," and that the last clause qualifies the other causes enumerated so that the word "fires" means "fires beyond the control of the defendant," and that the burden of proof was upon the defendant to show that the fire which occurred was beyond its control. We do not agree with this construction of the fire and strike clause. The language used is clear and free from ambiguity, and interpreting the words according to their natural and ordinary meaning, we are of opinion that the contingency of fires is independent of and distinct from all other causes enumerated, and cannot be construed as "fires beyond the control of the defendant."

The mill having been destroyed by fire, the defendant is wholly

relieved from performance; at least, in the absence of evidence to show that the fire was the result of its wilful and intentional wrong, or of that of its servants or agents.

The case at bar is to be distinguished from such cases as *Oakman v. Boyce*, 100 Mass. 477; *Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co.* 199 Mass. 22; and *Metropolitan Coal Co. v. Billings*, 202 Mass. 457, all of which cases involved the construction of strike clauses in contracts for the sale and delivery of coal, but where the contracts, properly construed, did not excuse performance absolutely, and where it was held that coal companies were required to make reasonable efforts to fulfil the contracts notwithstanding strikes.

There was evidence to show that the defendant was a lessee of its mill in Burlington which its lessor was under no legal obligation to rebuild after the fire; that the defendant had no other mill where the flooring could have been manufactured, and that it could not have been furnished to the defendant, had the mill been rebuilt, until the latter part of June, 1913.

Whether the contract is to be construed as requiring the defendant to deliver the flooring about June first, or "as required, probably shortly after June first," we are of opinion that upon all the evidence it could have been found that time was an essential part of the contract and was so contemplated by the parties; and the judge was warranted in finding that by reason of the destruction of the mill by fire it was impossible for the defendant to perform the contract according to its terms. *Pickering v. Greenwood*, 114 Mass. 479.

We perceive no error in the manner in which the presiding judge dealt with the requests for rulings, and are of opinion that the finding was warranted.

Exceptions overruled.

W. H. Garland, for the plaintiff.

H. Williams, Jr., for the defendant.

MARGARET SHEEHAN, administratrix, vs. BOSTON ELEVATED
RAILWAY COMPANY.

Suffolk. January 11, 1915. — February 24, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, Street railway, Res ipsa loquitur.

It has been settled by previous decisions of this court that the mere unexplained starting of an electric street railway car is not in itself evidence of negligence on the part of the corporation operating the railway.

In an action by an administrator against a street railway company for causing the death of the plaintiff's intestate, who was a conductor in the employ of the defendant and was standing on the track back of his own car when he was crushed against it by another car of the defendant that started up behind him, where the plaintiff contended that the car which ran against his intestate started automatically and that it might be inferred from this that the air brake was in a defective condition, it appeared that the accident happened on the second trip on that morning of the car that ran against the intestate, and the motorman and the conductor of that car both testified that up to the time of the accident they had noticed nothing out of the way about the car, and there was no evidence of any examination made or of any defect found after the accident. The plaintiff's expert, who described the mechanism of the air brake, testified that, "assuming that valve was in bang-up condition, it is possible that it could start to leak quickly and in such a condition it is possible for it to start all inside of an instant." *Held*, that, assuming in favor of the plaintiff that the jury could find that the car started automatically and that it might be inferred therefrom that the air brake was in a defective condition when the intestate was injured, there was no evidence that the defendant knew or ought to have known of such defective condition before the accident occurred.

DE COURCY, J. The plaintiff's intestate, Patrick McGann, was in the employ of the defendant company as the conductor on a car running through the East Boston tunnel. At the Boston terminus there is a single track, called a "dead end." On the morning of the accident the intestate's car was the last of three to come into this terminus, and necessarily would be the first to go out; and it was the duty of the motorman and conductor to change ends for the return trip. While McGann was adjusting the fender on the rear end of his car as reversed, the car behind him moved ahead and crushed him against his own car. At the trial the plaintiff waived all counts under the employers' liability act and relied on the common law counts for conscious suffering.

The negligence declared on was the alleged failure of the defendant to furnish and keep in repair safe and suitable appliances or mechanism for stopping and holding the car which ran into the intestate. A verdict for the defendant was ordered in the Superior Court.

The plaintiff asks us to extend to this case the rule applied in *Chiuccariello v. Campbell*, 210 Mass. 532, to wit, that from the unexplained starting of a machine in a factory, under circumstances when it ought not to have started at all, the jury could infer not only that there was a defect of some kind in the machine, but that it was due to negligence on the part of the employer. Even if this question arose now for the first time, we should hesitate to say that an electric car, operated on the highways in all kinds of weather, with frequent changes in the persons handling its mechanism, and driven by a force not yet fully understood, is in the same class with a machine in a factory, under the immediate control and constant supervision of the employer. In substance the plaintiff's contention is that a jury might find that an electric car "does not ordinarily start automatically without some negligence of omission or commission on the part of the employer, and that the existence of such negligence is the rational explanation of the starting." *Ryan v. Fall River Iron Works Co.* 200 Mass. 188, 193. But this question is no longer an open one. It has been held by this court in several cases similar to the one at bar that the mere unexplained starting of a car is not of itself sufficient to show negligence on the part of the employer. *Kenneson v. West End Street Railway*, 168 Mass. 1. *Curtin v. Boston Elevated Railway*, 194 Mass. 260. *Horne v. Boston Elevated Railway*, 206 Mass. 231. *Ridge v. Boston Elevated Railway*, 213 Mass. 460.

Assuming in favor of the plaintiff that the jury could find that the car started automatically, and that it might be inferred therefrom that the air brake was in a defective condition at the time, there was no evidence that the defendant knew or ought to have known of such defective condition before the plaintiff's intestate was injured. The car which ran into McGann was on its second trip that morning into the tunnel; and both the motorman and conductor testified that up to the time of the accident they noticed nothing out of the way about the car. There was no

evidence of any examination made and defect found after the accident. The plaintiff's expert described the mechanism of the air brakes, and testified that "there is apt to be a little grit get in there or a crack made in the disc which will allow the air to escape and this happens very frequently." But he added: "It might happen on a trip after looking it over say this morning or we will say in twenty-four hours." And in cross-examination he said, "that leak might come on inside of a trip or a half trip," and that "assuming that valve was in bang-up condition, it is possible that it could start to leak quickly and in such a condition it is possible for it to start all inside of an instant." He added that "a man who was operating a car and using the brakes would be the first of all others to realize that that brake wasn't working." The testimony of the conductor that the car slid twice on the return to the barn after the accident and when the motor-man was very nervous, is immaterial in view of his further testimony that he did not notice anything in particular about the car before the accident.

As there was no evidence that the defendant was negligent in failing to discover and remedy the defect, assuming that there was one, it was entitled to have a verdict entered in its favor. *Curtin v. Boston Elevated Railway*, 194 Mass. 260. *Hill v. Iver Johnson Sporting Goods Co.* 188 Mass. 75. *Toland v. Paine Furniture Co.* 175 Mass. 476.

Exceptions overruled.

W. H. Hitchcock, (J. J. O'Hare with him,) for the plaintiff.

E. P. Saltonstall, (C. W. Blood with him,) for the defendant.

PATRICK ROGERS vs. F. A. SNOW COMPANY.

Bristol. January 13, 1915. — February 24, 1915.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & PIERCE, JJ.

Negligence, Employer's liability.

Where an employee of an expressman or teamster, who for a period of from three to four months had been "lifting and unloading heavy things" and carrying them in an express wagon, was ordered to go with his wagon for a manhole cover weighing three hundred and seventy-five pounds and was told that a

man would be sent up to help him load, and where, although he previously had loaded similar manhole covers at the same place and always had had a man to help him and never had attempted to load such a cover alone and although on these previous occasions the two men always had used two wooden horses to support the cover that was being put in the wagon and the employee had been instructed that this was the proper way to load a cover, yet on this occasion, when he found on getting to the place that the man whom he expected to help him was not there, after waiting ten minutes he undertook to load the cover alone using one wooden horse instead of two and was injured by the cover falling on his foot, it was *held*, that his injury was due to his own fault and that he had no cause of action against his employer.

TORT for personal injuries sustained by the plaintiff on December 29, 1909, when in the employ of the defendant, the declaration containing counts both under the employers' liability act and at common law. Writ dated August 25, 1910.

In the Superior Court the case was tried before *Morton, J.* The bill of exceptions contained the following statement: "The accident happened on the premises of the Fall River Electric Light Company shortly after seven o'clock on the morning of December 29, 1909. The plaintiff was employed and his wages were paid by R. B. Reid, an expressman. The defendant, however, hired a horse, wagon and driver from said Reid, and had full authority to control the plaintiff's actions and furnish materials and implements at the time of the accident, so that to all intents and purposes the plaintiff was in the direct employ of the defendant and was subject to all the rights and liabilities of the law governing employer and employee." The evidence in regard to the plaintiff's injury is described in the opinion. At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

D. R. Radovsky, for the plaintiff.

F. R. Greene, for the defendant.

PIERCE, J. This is an action to recover damages for personal injuries suffered by the plaintiff while in the employ of the defendant. For a period of from three to four months before the accident he had been engaged in "lifting and unloading heavy things" and carrying them in an express wagon. On the morning of December 29, 1909, he received an order from his foreman to go to the premises of the Fall River Electric Light Company and there load his wagon with a manhole cover casting, weigh-

ing about three hundred and seventy-five pounds. When this order was given he was told that a man would be sent up to help him load. At other times at this place he had loaded like man-hole covers and had been told to do so without assistance; but he always had had one man to help him and never had attempted to load the casting alone before the day of the accident.

On the first occasion of his going for the castings he was accompanied by one McManigle, from whom he took orders. On their arrival McManigle got two wooden horses, placed them at the back of the wagon, and as he did so said, "That is just the thing, . . . That is just the way to use them," and together rolled the casting on the wagon.

On the morning of the accident the plaintiff arrived at the premises of the electric light company at about five minutes before seven o'clock. The man whom he expected to help him was not there, so he went for the wooden horses which he had been using for about eight weeks, found one of them, brought it and placed it near the tailboard of the wagon. He again looked for his helper but did not find him; and at about ten minutes past seven he undertook to load the casting by himself in this way: He rolled it to the side of the wooden horse, stood it on its edge, lifted it and tipped it "end on end" until one end (rim) of it rested on the centre of the centre board. The wooden horse, not having been built to sustain so great a weight, broke, and the casting fell on the plaintiff's foot, causing the injuries complained of. Both wooden horses would have sustained the casting had there been two men to handle them and balance the weight to be put upon them.

It thus appears that the plaintiff, after ten minutes of waiting for the appearance of the promised helper, undertook to do the work in his own way and in his own time, without the impulsion of exigency, without direction, suggestion or command from any one whom he might feel bound to obey, and in disregard of his foreman's instructions. It turned out that his way was improper and careless, and that the accident was due to his fault and not to any default of his employer.

There is no evidence that the employer failed in the performance of any duty it owed to the plaintiff.

Exceptions overruled.

MARTHA COHEN vs. HENRY SIEGEL COMPANY.

Suffolk. November 19, 1914. — February 25, 1915.

Present: RUGG, C. J., LOBING, BRALEY, DE COURCY, & Crosby, JJ.

Evidence, Admissions by conduct. Negligence, Of bailee for hire. Bailment. Practice, Civil, Exceptions.

In an action by a woman for the loss of a fur coat which she had delivered to the defendant as a bailee for hire to keep for her in cold storage, it could have been found that the plaintiff delivered the fur coat and a muff to the defendant's teamster who called for them, that on the evening of that day the plaintiff was asked by telephone whether she had lost any furs, that the next morning she went to the defendant's store and asked the man in charge of the fur department whether her furs had been delivered, that he told her that the furs were there, but with various excuses refused to allow the plaintiff to see them in the cold storage room, that on the same day the plaintiff received from the defendant a receipt for the furs naming a valuation which was not satisfactory to her, that the next day the plaintiff went again to the defendant's store and refused to accept the receipt because the valuation was too low and demanded the return of her furs, offering to pay for the short time they had been there, but that neither the coat nor the muff were given to her, although the man in charge told her that they would be returned to her as soon as the numbers were identified, making an excuse for the delay, that thereafter the plaintiff called at the store many times and demanded her furs but never received them, that four months after the plaintiff gave her furs to the defendant's teamster their loss for the first time was reported to the head of the defendant's fur department, and that the plaintiff never was told that her furs were missing until two months later, that afterwards "they told her they did not have the coat and muff," that shortly after that the plaintiff brought her action and that after the action was brought the muff was returned to the plaintiff without any explanation. *Held*, that on this evidence the jury were warranted in drawing the conclusions that the defendant's agent who made the excuses to the plaintiff had tried to hide the real facts from her and that he knew that he or some of his fellow servants were at fault in the matter, and in drawing the further conclusion that the head of the defendant's fur department, who failed to notify the plaintiff of the loss of her furs for two months or to explain the way in which the muff was found, knew that his people were at fault, and that consequently there was evidence of the defendant's negligence, on which the plaintiff, who had not agreed to any valuation of her fur coat, could recover the full value of the coat from the defendant if she obtained a verdict.

A defendant, in arguing that the plaintiff should not have been allowed to go to the jury, is not entitled to rely on any evidence which the defendant himself introduced.

CONTRACT OR TORT for the loss of a fur coat entrusted to the defendant for cold storage. Writ dated December 4, 1912.

The second count was for an alleged conversion of the coat. The fourth count was as follows: "And the plaintiff further says that in consideration of the delivery by her to the defendant of certain valuable merchandise and in further consideration of the payment to the said defendant of a certain sum of money, the defendant undertook and agreed to receive, and did receive said merchandise, and did undertake to take due and proper care thereof; and the plaintiff avers that the defendant wholly regardless of its terms and undertaking took improper and bad care of said merchandise and through its negligence the said merchandise is lost to the plaintiff, to the great damage of the said plaintiff."

In the Superior Court the case was tried before *Wait, J.* The facts which could have been found in favor of the plaintiff upon the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to rule, among other things, that the plaintiff could not recover upon the second or upon the fourth count of her declaration. The judge refused to make these rulings.

The sixteenth ruling requested by the defendant, which is referred to in the opinion, was as follows: "16. If the defendant placed the plaintiff's goods in a steel vault, which was guarded by day and securely locked at night, to which only its employees could at any time have any access, and if it exercised a reasonable degree of care in selecting its employees who guarded or had access to the vault, it was exercising all the care which a reasonably careful owner of similar goods would have exercised."

The judge refused to make this ruling "in the form as requested and substantially charged that the burden of proof was on the plaintiff to establish that the defendant had failed to exercise the same degree of care with reference to these goods that a reasonably careful owner of similar goods would have exercised."

On the second count the jury returned a verdict for the defendant. On the fourth count the jury returned a verdict for the plaintiff in the sum of \$800; and the defendant alleged exceptions.

J. B. Studley, for the defendant.

S. L. Bailen, for the plaintiff.

LORING, J. On the evidence before them the jury were warranted in finding the following to be the facts of the case. In April, 1912, the plaintiff called up the defendant on the telephone and asked it to send a wagon for a fur coat and muff of hers which she wished to have kept in cold storage. In consequence the defendant's teamster called at the plaintiff's house and took away the coat and muff. The defendant admitted that the coat and muff were delivered by the teamster to the person in charge of the department of its store in which furs were kept in cold storage. This was on April 23, 1912. In consequence of a communication by telephone which the plaintiff received in the evening of the same day she went the next morning to the defendant's store and saw there one Rosenthal. The defendant's evidence shows that Rosenthal was the first assistant in the fur department of the defendant company, was the agent of the defendant in direct charge of that department, and was the person authorized by the defendant to receive complaints as to the storage of furs. It appeared later in the evidence that what had been referred to as a communication by telephone was this: On the evening of the day when the furs were taken by the defendant's teamster somebody rang up the plaintiff on the telephone and asked her if she had lost any furs; she then began to question this person and he rang off. When the plaintiff called at the defendant's store (in consequence of what she had heard on the telephone the evening before) she saw Rosenthal and asked him if the fur coat had been delivered. Rosenthal at first said yes, and later said he would ring up the storage place and "ask if the furs were there." He did so and told the plaintiff that the furs were there. Thereupon the plaintiff said that she wanted to go and see the furs because she was nervous, because the coat was a present from her husband; Rosenthal then told her not to worry; that the tickets were mixed up and in a day or two she could call and see her furs. Thereupon she insisted upon seeing the furs then, but Rosenthal refused to let her do so. The plaintiff thereupon said to Rosenthal that she had been to the storage place many times before, and if the tickets were mixed she could identify her coat. But Rosenthal put her off and told her to call in a day or two and he would take her upstairs. On the same day but after this interview the plaintiff received from the defendant a receipt for her coat and

muff in which the two were valued at \$300. The next day the plaintiff went again to the defendant's store, saw Rosenthal, and refused to accept the receipt on the ground that the valuation was too low; she then demanded the return of her coat and offered to pay whatever money they might "claim for the short time it was there." But neither the coat nor the muff was given to her. At this time Rosenthal told her to keep the receipt "for the purpose of identifying the number upon it and her goods would be returned to her as soon as the numbers were identified." At some of these interviews Rosenthal told the plaintiff that the trouble was that "they had green help and the tickets had been mixed up," and it would take some time to straighten matters out and they would let her know about it. After that she called at the store many times and demanded her coat, but did not receive it; and this lasted "over a period of several months." The plaintiff further testified that she never gave any valuation upon the merchandise and that she never agreed to permit the coat to stay with the defendant after receiving the telephone call on the first evening the coat was taken.

In August, 1912, the loss of these furs was reported to one Latz, the head of the defendant's fur department, and it was not reported to him until then. Lastly, although the defendant promised to let the plaintiff know, she never was told that her furs were missing until October, 1912.

The plaintiff also testified that "in the winter of 1912 they told her they did not have the coat and muff." We interpret this to mean, or the jury could have interpreted this to mean, that this was in the autumn of 1912. This action was brought on December 4, 1912. "Later, after suit was brought, the muff was returned to" the plaintiff, but no explanation ever was given by the defendant as to its statement made "in the winter of 1912," that it did not at that time have the muff, and as to the fact that "later" on the muff was returned to her.

On these facts the plaintiff proved that she had delivered the coat and muff to the defendant as bailee for hire, and that she never had agreed to the valuation put upon them by the defendant. Under these circumstances she was entitled, — on proving that the defendant was negligent, — (see *Willett v. Rich*, 142 Mass. 356) to recover the full value of the furs.

If the jury did find these facts, they were well warranted in drawing the conclusion that Rosenthal tried to hide the real facts from the plaintiff and from his superiors, and they were justified in drawing from the facts the further conclusion that Rosenthal knew that he or some of his fellow servants were at fault in the matter. Not only were the jury warranted in drawing the conclusion that Rosenthal knew that he or his fellow servants were at fault, but they were warranted in drawing the further conclusion from Latz's actions that he knew that his people were at fault. Latz gave the plaintiff no notice of the loss of her furs before October, although he knew of the loss in August, and no explanation ever was given of the way in which the muff was found after the plaintiff had been told that it was not in the defendant's possession.

It becomes necessary in view of the defendant's argument to state once more that a defendant, in arguing that the plaintiff has failed to make out a case, is not entitled to rely on evidence which he has introduced. The doctrine of *Lindenbaum v. New York, New Haven, & Hartford Railroad*, 197 Mass. 314, ought to be familiar to the bar.

The sixteenth ruling asked for by the defendant is taken from a case where the defendant was a gratuitous bailee. *Smith v. First National Bank in Westfield*, 99 Mass. 605.

The defendant is right in its contention that (as was decided in *Childs v. American Express Co.* 197 Mass. 337) it is necessary for the party who has the burden of proof "to remove the cause from the realm of speculation." In our opinion that was done by the plaintiff in this case.

We find nothing in the other cases cited by the defendant which requires special notice.

The entry must be

Exceptions overruled.

WILLIAM A. COUGHLIN vs. HENRY ROSEN.

Middlesex. December 2, 1914. — February 25, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Res Judicata. Assault and Battery. Agency, Scope of employment.

In an action of tort for an assault and battery alleged to have been committed by an agent of the defendant within the scope of his employment in attempting to expel the plaintiff from premises occupied by him under a lease from the defendant, the record of a suit in equity, brought by the plaintiff against the defendant immediately after the assault in question to enjoin the defendant from interfering with the plaintiff's possession of the leased premises, in which the trial judge found that "the defendant's servants unjustifiably assaulted the plaintiff" by committing the assault in question and a decree was entered enjoining the defendant from "interfering with the plaintiff's right of possession of the premises," is admissible in evidence and conclusively establishes the fact that an unjustifiable assault was committed upon the plaintiff by a person who at that time was the servant of the defendant.

In an action for an assault and battery alleged to have been committed by an agent of the defendant within the scope of his employment in attempting to expel the plaintiff from premises occupied by him under a lease from the defendant, where it is proved by the record of a suit in equity between the same parties that an unjustifiable assault was committed upon the plaintiff by a person who at that time was a servant of the defendant, if there also is evidence that the plaintiff was struck on the head with a heavy iron bar by one of seven men who went with the defendant's attorney to take possession of the premises occupied by the plaintiff intending to use force if necessary for that purpose, and that the defendant told his attorney in substance, "Get him [the plaintiff] out any way at all so long as you get him out of there; . . . to put everything out of the place, hiring men for the purpose, and he would stand all expenses, and if [the plaintiff] and his men showed fight to throw them all out," it can be found by the jury that the assault was committed by the defendant's servant for the purpose and as a means of obtaining and holding possession of the premises and that he was acting within the scope of his employment.

TORT for an assault and battery committed upon the plaintiff on January 12, 1912, by one Eddels, who was alleged to have been an agent of the defendant acting within the scope of his employment, at the premises numbered 293, 295 and 297 on Prospect Street in Cambridge, which were occupied as a garage by the plaintiff under a lease from the defendant. Writ dated November 15, 1912.

In the Superior Court the case was tried before *Morton, J.*

The evidence is described in the opinion. The defendant excepted to the admission in evidence by the judge of the record of a suit in equity brought by the plaintiff against the defendant which is a part of the evidence there described. At the close of the evidence the defendant asked the judge to rule that upon all the evidence in the case the plaintiff was not entitled to recover. The judge refused to make this ruling and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$4,000. The defendant alleged exceptions.

E. Greenhood, (C. Gerstein with him,) for the defendant.

G. M. Poland, (E. E. Clark with him,) for the plaintiff.

CROSBY, J. This is an action for an assault committed upon the plaintiff by one Eddels, who was alleged to be an agent of the defendant and acting within the scope of his employment.

On the twelfth day of January, 1912, the date of the alleged assault, the plaintiff occupied, under a written lease, certain premises owned by the defendant. The plaintiff occupied the leased premises as a garage. The defendant asserted that the plaintiff had violated certain provisions of the lease, and a few days before the alleged assault he consulted with one Scharton, an attorney, for the purpose of ejecting the plaintiff from the premises.

There was evidence to show that in the forenoon of the day of the assault Scharton, acting as attorney for the defendant, sent his clerk, one Weinstein, with four other men, to the premises occupied by the plaintiff, for the purpose of taking possession; but they were driven away by the plaintiff.

There was also evidence that on the afternoon of the same day Scharton, accompanied by the men who went to the plaintiff's premises with Weinstein in the forenoon and by two other men, one of whom was Eddels, making seven in all, went to the plaintiff's garage for the purpose of ejecting him and his goods and effects. The plaintiff succeeded in driving them off the premises with the exception of Eddels and one other man who remained inside the garage. There was further evidence to show that when the plaintiff discovered that Eddels was upon the premises he (the plaintiff) told him to leave, whereupon Eddels struck the plaintiff upon the head with a heavy bar of iron, causing the injuries complained of in this action.

After the alleged assault, but upon the same day, the plaintiff brought a bill in equity against the defendant to prevent the latter from interfering with the plaintiff's possession of the leased premises. The bill alleged that on the twelfth day of January, 1912, the defendant, by his servants and agents, attempted to eject the plaintiff from the building and committed an assault and battery upon him. The judge of the Superior Court before whom the equity suit was heard found that the defendant asserted that there was a breach of covenant to pay rent, and entered the premises, and in the process of so doing, "the defendant's servants unjustifiably assaulted the plaintiff by striking him on the head with a heavy iron bar." A final decree subsequently was entered and an injunction was issued prohibiting the defendant from "interfering with the plaintiff's right of possession of the premises for and when the plaintiff paid certain amounts of money which were due for rent."

1. The record in the equity suit was admissible in evidence, and established conclusively the facts (a) that Eddels committed an unjustifiable assault upon the plaintiff, and (b) that Eddels was at that time the defendant's servant. The presiding judge in the case at bar limited the extent to which the evidence, as shown by the record in the equity case, was competent, and instructed the jury that the plaintiff, in order to recover, must prove not only that Eddels was the defendant's servant and did the wrongful act, but that such act was expressly or impliedly authorized by the defendant, and was so committed by Eddels for the purpose of assisting or holding forcible possession of the premises, and not for reasons personal to himself. The equity suit was between the parties to this action and the questions whether the assault committed by Eddels was unjustifiable and whether he was a servant of the defendant were material issues, and as to them the record was *res judicata*. The defendant's exception to the admission of this evidence cannot be sustained. *Corbett v. Craven*, 193 Mass. 30. *Newburyport Institution for Savings v. Puffer*, 201 Mass. 41. *Flynn v. Howard*, 218 Mass. 245.

2. The defendant also excepted to the refusal of the judge to rule that upon all the evidence the plaintiff was not entitled to recover. It would serve no useful purpose to recite the evi-

dence in detail. The defendant, who was not present when the assault was committed, testified that he authorized neither his attorney Scharton nor any one else to take forcible possession of the leased premises. Scharton testified that he did not go to the premises for the purpose of taking possession by force, and that he withdrew as soon as there seemed to be danger of violence. On the other hand, there was evidence that the defendant told Scharton in substance to "Get him [Coughlin] out any way at all so long as you get him out of there;" that he (Rosen) told Scharton that he would stand all expense of getting Coughlin out, and also told him (Scharton) "to put everything out of the place, hiring men for the purpose, and he would stand all expenses, and if Coughlin and his men showed fight to throw them all out."

There was further evidence from which the jury could have found that when the defendant's attorney went to the plaintiff's garage with seven men to take possession of the premises it was intended to use force if necessary to accomplish the object of their visit. The jury were warranted in finding that the assault was committed by Eddels for the purpose and as a means of obtaining and holding possession of the premises, and that he was acting within the scope of his employment.

"The test of the liability of the master is, that the act of the servant is done in the course of doing the master's work, and for the purpose of accomplishing it. If so done it is the act of the master, and he is responsible whether the wrong done be occasioned by negligence, or by a wanton and reckless purpose to accomplish the master's business in an unlawful manner." *Levi v. Brooks*, 121 Mass. 501. *Grant v. Singer Manuf. Co.* 190 Mass. 489. *Barden v. Felch*, 109 Mass. 154. *Howe v. Newmarch*, 12 Allen, 49.

Exceptions overruled.

JOSEPH A. BUTLER vs. GEORGE J. MARTIN & another.

Suffolk. December 7, 1914. — February 25, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Corporation, Stockholder's right to inspect books and records. Mandamus.

On a petition by a minority stockholder in a Massachusetts manufacturing corporation against the corporation and the holder of a majority of its stock, who also was its president and treasurer, for a writ of mandamus commanding the respondents to permit the petitioner to inspect the books and records of the corporation, the petitioner's alleged purposes in seeking the examination were to enable him to determine whether to sell the stock and to determine whether there had been mismanagement of the business. On the first ground it appeared that by a provision in the agreement of association a stockholder desiring to sell any common stock must offer it to the corporation at its book value as shown by the company's books at the time of stock taking next preceding the date of the offer. It further appeared that the corporation was practically a "one man" company controlled by the individual respondent. On the second ground an auditor, after stating that the profits certified to by the corporation in the second year preceding the petition had been \$12,000 and that in the year immediately preceding the petition they had been only \$2,100, found that "this falling off is so large that a stockholder might well consider that it called for investigation." The justice who heard the case on the auditor's report made an order for the issuing of the writ of mandamus. *Held*, that the justice was warranted in ordering the issuing of the writ.

Upon a petition of a minority stockholder in a corporation for a writ of mandamus against the corporation and the holder of a majority of its stock, who also was its president and treasurer and controlled the corporation as practically a "one man" company, for a writ of mandamus commanding the respondents to permit the petitioner to inspect the books and records of the corporation, the fact, that the petitioner's request is connected with a controversy between him and the individual respondent as to an alleged agreement of that respondent to buy back the petitioner's stock, will not prevent the court from issuing the writ to enforce the right of inspection, if it appears that the petitioner is acting in good faith and that his purpose is not hostile to the interests of the corporation.

PETITION, filed on September 1, 1914, by a minority stockholder in the Martin Manufacturing Company, a corporation organized under the laws of this Commonwealth engaged in the manufacture of textiles and particularly of lace curtains, for a writ of mandamus addressed to that corporation and to George J. Martin of Newton, its president and treasurer and the

holder of a majority of its stock, commanding the corporation and Martin to produce for examination and to permit the petitioner and his agents and attorneys to examine all the books and records of the corporation and to make copies and abstracts thereof under such regulations as the court might prescribe.

The case was referred to an auditor, who filed a report containing among other findings those which are stated in the opinion.

The case was heard by *Hammond, J.*, upon a motion of the petitioner that the auditor's report might be confirmed and that a writ of mandamus might issue as prayed for.

The respondents asked the justice to rule that upon the auditor's report the petitioner had not made out a case which entitled him to a writ of mandamus. The justice refused to make this ruling, and ordered that a writ of mandamus should issue. The respondents alleged exceptions.

The case was submitted on briefs.

F. P. Garland, for the respondents.

C. H. Tyler, B. Corneau & B. E. Eames, for the petitioner.

DE COURCY, J. The petitioner owns one hundred and seventy-seven shares of the capital stock of the respondent corporation, for which he paid \$20,000; and the respondent Martin, who is president and treasurer, owns seven hundred and eighty of the twelve hundred and fifty shares outstanding. The petitioner's alleged purpose in seeking to examine the books of account and deposit and the records of stock takings is (1) to ascertain the real value of his stock in order to determine whether to sell it, and if so for what price, and (2) to determine whether there has been mismanagement of the business, and to enable him to take proper proceedings for the benefit of the corporation and of his interest therein, if he discovers facts that justify such action.

In support of the second ground, it appears from the report of the auditor that according to the certificates of condition filed at the State House the corporation made a profit of \$12,000 for the fiscal year ending June 1, 1913, while for the year ending June 1, 1914, it made a profit of only \$2,100. After setting forth these facts the auditor says: "It may well be that the falling off in earnings of this corporation during the last year is not at all due to mismanagement or waste; but, in my opinion this falling off is

so large that a stockholder might well consider that it called for investigation."

With reference to the first ground, the provision in the agreement of association regarding the disposition of shares of stock is important. According to this, if the petitioner desires to sell any of his common stock he must offer it to the corporation at the book value as shown by the company's books at the time of stock taking next preceding the date of the offer. This provision makes the stockholder particularly interested in the correctness of the company's bookkeeping. Further, the individual respondent, by virtue of his controlling interest in the stock, has full command of the business of what is practically a "one man" company, as well as the custody of its books, and the petitioner, as a minority stockholder, is placed at a disadvantage in the sale of his stock.

It is urged that there has been a controversy between Butler and Martin as to an alleged agreement by Martin to buy back the petitioner's stock; and the auditor intimates that the petitioner's request to examine the books is connected with that disagreement. Probably it is the usual case that these applications are made by stockholders who are dissatisfied for some reason. That fact will not prevent the court from enforcing the right of inspection unless the purpose of the stockholder is hostile to the interests of the corporation, or his motive is to promote some ulterior purpose of his own apart from his interests as a stockholder. 42 L. R. A. (N. S.) 332, note. In this case it must be inferred from the fact that the single justice made an order for the writ to issue that he found that the petitioner is acting in good faith.

The common law right of inspection by a stockholder is a qualified and not an absolute one, and its enforcement by mandamus is discretionary with the court. It is clear however that on the facts presented the single justice was warranted in ordering that the writ should issue as prayed for. *Varney v. Baker*, 194 Mass. 239.

The statutory right of inspection provided by St. 1903, c. 437, § 30, is not involved in this case. See *Powelson v. Tennessee Eastern Electric Co.*, *post*, 380.

The justice rightly declined to give the ruling requested.

Exceptions overruled.

HARRY M. RAMSAY vs. HENRY A. LEBOW.

Suffolk. January 11, 12, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Practice, Civil, New trial, Requests for rulings. *Contract*, Implied. *Evidence*.

It is improper at the hearing of a motion for a new trial for the first time to raise by a request for a ruling a question of law that might have been raised at the trial of the case.

At the trial of an action of contract by an architect against a builder upon an account annexed for \$1,500, alleged to be the value of certain services rendered by the plaintiff to the defendant, the plaintiff testified in substance that he agreed with the defendant to furnish for \$4,500 services in planning and supervising the construction of certain buildings; that he made plans and performed some other preliminary services, which constituted "three fifths in amount and value of the entire work to be done for the entire price," and was ready to complete his part of the contract, but that the defendant did not go forward with the buildings. It was agreed by the counsel for both parties at the trial that "the action be tried without reference to the pleadings and that if the evidence showed that the plaintiff had any rights which were not set forth in the . . . declaration, it would be open to the jury to find for the plaintiff, regardless of the pleadings whether for breach of contract or upon any other ground." The jury found for the plaintiff in the sum of \$824. *Held*, that the jury were not compelled to accept all of the plaintiff's testimony as true, even if it was not disputed, and that, upon the evidence and the agreement of counsel, the verdict was warranted.

CONTRACT upon an account annexed for \$1,500 and interest for professional services in making plans and specifications for an apartment building on Westbourne Terrace in Brookline. Writ dated July 14, 1913.

In the Superior Court the case was tried before *Bell, J.* The record states that "after the pleadings were read at the trial it was agreed by counsel that the action be tried without reference to the pleadings and that if the evidence showed that the plaintiff had any rights which were not set forth in the plaintiff's declaration, it would be open to the jury to find for the plaintiff regardless of the pleadings whether for breach of contract or upon any other ground."

The plaintiff was an architect. He testified that he made an express oral agreement with the defendant to draw the plans and specifications, to get a building permit and bids and to super-

intend the construction of the buildings, all for the price of \$4,500; that he drew the plans and specifications, and got the permit and the bids and was waiting for the defendant to start the buildings for him to supervise, but that the defendant did not so build but abandoned the project; that the work that the plaintiff did was three fifths in amount and value of the entire work to be done for the entire price.

Other material evidence is described in the opinion, where also are set out the verdict for the plaintiff in the sum of \$824 and the proceedings as to the defendant's motion for a new trial and his exception to its denial by the judge. The record states that, "in support of the motion and request to rule, the defendant contended that upon no aspect of the evidence could the jury find any such verdict; that, upon the undisputed evidence, if the plaintiff was entitled to a verdict, he was entitled to three fifths of the \$4,500, and that the jury was bound to find either that the defendant had made the contract the defendant testified to and find for the defendant, or that the contract was what the plaintiff testified it was, and, therefore, he was entitled to three fifths of \$4,500."

E. Greenhood, for the defendant.

J. J. Cummings, for the plaintiff, was not called upon.

CROSBY, J. After a trial of this action and a verdict for the plaintiff, the defendant filed a motion for a new trial and asked the judge to rule that "as matter of law, the verdict must be set aside." The judge refused so to rule and overruled the motion. The defendant excepted to the refusal to rule as requested, and to the order overruling the motion for a new trial.

Motions for a new trial, under our practice, usually are addressed solely to the discretion of the presiding judge. The record does not show that at the trial the defendant made any requests for rulings, or that he excepted to any rulings given, but it appears that "the court submitted the case to the jury on appropriate instructions, and the jury returned a verdict for \$824."

To raise the question of law, embodied in the motion, for the first time after verdict, is irregular. It often has been held by this court that a question that was raised, or that might have been raised, before a verdict, cannot be raised upon a motion to set aside the verdict and to grant a new trial. Although the

statute (R. L. c. 173, § 106) provides that exceptions may be taken to rulings on questions of law at hearings on motions for a new trial, still the statute has been held not to apply to rulings "that were given or refused, or that might have been asked for and given or refused, at the trial before the verdict." *Loveland v. Rand*, 200 Mass. 142, 144. In that case the exceptions then being considered were "to rulings upon questions arising for the first time at the hearing on the motion for a new trial." See also *Capper v. Capper*, 172 Mass. 262.

While the disposition of the motion for a new trial was wholly within the discretion of the presiding judge, we are of opinion, after carefully examining the evidence reported, that it is sufficient to warrant the verdict of the jury for the plaintiff.

The record, after reciting certain evidence offered by the plaintiff and by the defendant, states that "the plaintiff also introduced evidence tending to show the amount of time he had expended in the work he had done, and the amount of money he had laid [paid] out of his own pocket in developing the plans."

As it was agreed at the trial that no question of pleading should be raised, and that "it would be open to the jury to find for the plaintiff, regardless of the pleadings whether for breach of contract, or upon any other ground," the plaintiff would have been entitled to recover upon a *quantum meruit* what, if anything, the jury believed his services were reasonably worth.

The jury were not bound to believe the testimony of either party or his witnesses in its entirety. While the plaintiff testified that he made an oral agreement with the defendant to draw certain plans and specifications and procure certain permits and superintend the construction of the buildings, all for the sum of \$4,500, and while he further testified "that the work . . . [he] did was three fifths in amount and value of the entire work to be done for the entire price," still the jury were not compelled to accept this testimony as true, even if the defendant did not dispute it. It might have been found that the work done was less than three fifths of what the contract called for, and that the fair and reasonable value of the services rendered was the amount of the verdict.

As the motion for a new trial was wholly within the discretion of the trial judge, we cannot revise the action of the judge on exception.

Exceptions overruled.

JOHN T. GRAHAM vs. INSURANCE COMPANY OF NORTH AMERICA.

Suffolk. January 12, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Insurance, On goods during transportation. Automobile. Words, "Derailment."

The skidding of the hind wheels of an automobile truck into a gutter when the truck is being operated upon a public highway, so that the truck is caused to capsize and its contents to be injured, is not a "derailment" of the truck within the meaning of that word as used in a policy of insurance of the contents of the truck during transportation "against loss or damage by fire, collision or derailment on land."

CONTRACT upon a policy of insurance of goods during transportation. Writ in the Municipal Court of the City of Boston dated February 6, 1914.

The case was heard in the Municipal Court by *Duff, J.*, who found for the plaintiff in the sum of \$397.50, and at the request of the defendant reported the case to the Appellate Division. The material facts are stated in the opinion. The Appellate Division ordered that judgment be entered for the defendant. The plaintiff appealed.

A. P. Gay, for the plaintiff.

F. W. Eaton, for the defendant.

CROSBY, J. This is an action of contract upon a transportation certificate of insurance, so called, issued to the plaintiff by the defendant. In the margin of the certificate the following printed words appear: "This insurance is only against loss or damage by fire, collision or derailment on land, and marine perils while on ferries and transfers." In the body of the certificate the following appears: "Shipped by Auto Truck at and from Medford Mass. to destination East Princeton Mass. covering only while in transit by land. . . ."

While the property of the plaintiff was in course of transportation by auto truck the wheels of the truck skidded into the gutter, causing the truck to tip and capsize. The amount of damage to the property for which the plaintiff would be entitled to recover,

if the defendant is liable at all under the certificate, has been agreed upon by the parties.

As the accident which resulted in the damage to the plaintiff's goods was not caused by fire, or by collision, the sole question presented is whether the damage was caused by a "derailment" as meant by the certificate or contract of insurance. "Derailment" is defined by Webster's International Dictionary as "The act of going off, or the state of being off, the rails of a railroad."

The word is to be interpreted according to the general and ordinary acceptance of the language used in the absence of evidence that it has acquired by custom or otherwise a peculiar meaning distinct from the popular sense of the word. It is to be understood as conveying the usual meaning of the word as commonly accepted. It is plain that "derailment" is used only in connection with transportation by rail as distinguished from transportation by vehicles over land by means other than by rail, and as distinguished from transportation by water.

The language of the certificate is clear and free from ambiguity, and the parties must be bound by the agreement which they have entered into, in the absence of fraud or some other legal reason justifying a repudiation of the contract. *Hatch v. United States Casualty Co.* 197 Mass. 101.

We are of opinion that the skidding of the hind wheels of the truck into the gutter, causing it to capsize when it was being operated upon a public highway, cannot be found to be a "derailment."

The entry must be

Judgment affirmed.

SAMUEL H. WALDSTEIN vs. PHILIP DOOSKIN & another.

Suffolk. January 15, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Evidence, Extrinsic affecting writing. Contract, In writing.

The position on the paper of words written in an order for goods may create such an ambiguity as to render oral evidence admissible to explain the meaning of the instrument.

At the trial of an action by one broker against another for an alleged breach of a contract to receive and pay for cotton waste, it appeared that, after a telephone conversation between the parties relating to the sale of the waste by the plaintiff to the defendant, the plaintiff wrote to the defendant a letter purporting to confirm the contract, and the defendant for the same purpose delivered to the plaintiff a purchase order signed by him containing three items, each occupying a line. The first two items were for twenty-five thousand pounds of waste at a specified price. Under them at the left side of the paper was an item of two hundred bales, and opposite it at the right side of the paper were the words "To Be shipped about 25000 monetly." On the next line of the order and near the middle of the paper, standing alone, were the words "if desired." On the same line with them and under the words, above described, at the right side of the paper were other words descriptive of price and quality. *Held*, without deciding that the plaintiff's letter and the defendant's order constituted a contract between the parties, that it could not be ruled as a matter of law that the words "if desired" related only to the time of shipment, and that there was enough of doubt and uncertainty as to their meaning to warrant the admission of evidence to explain them and to require the submission of the question of their meaning to the jury.

CONTRACT for the alleged breach of an agreement by the defendants to accept and pay for two hundred bales of cotton waste, called "WAS cotton waste." Writ dated December 29, 1911.

In the Superior Court the case was tried before *Bell, J.* There was evidence that the plaintiff and the defendants were brokers, that the plaintiff and the defendant Dooskin had a telephone conversation on May 24, 1911, with regard to the sale of the cotton waste, and that after that conversation and in confirmation of it the plaintiff wrote to the defendants a letter in substance as follows:

"May 24th, 1911. Messrs. Boston Fibre Co., Boston Mass.
Gentlemen: We confirm our today's phone conversation with

exceptions by the defendants: "I shall rule for the present that this is not an option as a matter of law. I am going to rule that those two papers constitute the contract and I shall also rule that the two hundred bales were not an option. That is my construction of those two papers and I so rule for the present and we will go on and try out the case on the question of warranty."

Other material evidence is described in the opinion.

At the close of the evidence the defendants asked for the following rulings among others:

"It is a question of fact for the jury on the evidence and in view of all the conversations in evidence whether or not the two hundred bales was to be construed as an option.

"The question as to the ambiguity of the contract as shown by the words 'if desired' in the order 'No 01' is a question for the jury."

Subject to exceptions by the defendants the judge refused to rule as requested and charged the jury as a matter of law in substance that the words "if desired" referred to the words "To Be shipped about 25000 monetly."

The jury found for the plaintiff in the sum of \$583.71; and the defendants alleged exceptions.

E. Greenhood, for the defendants.

J. Wasserman, (*M. M. Horblit* with him,) for the plaintiff.

CROSBY, J. This is an action for damages for the alleged breach of a contract by the defendants because of their refusal to accept and pay for two hundred bales (one hundred thousand pounds) of cotton waste or screen.

The plaintiff and the defendants had a conversation by telephone relating to the sale by the plaintiff to the defendants of the cotton waste on May 24, 1911, and there was evidence to show that as a result of this conversation and as confirmatory of the oral agreement between the parties a written order was sent by the defendants to the plaintiff and a letter was sent by the plaintiff to the defendants. The order and letter, each being dated May 24, 1911, include a purchase and sale of one hundred bales of waste or screen in addition to the two hundred bales which are the subject of the present action.

The case seems to have been tried by both parties upon the assumption that whatever oral contract had been made between

them was merged in the letter and the order above referred to. The bill of exceptions states that "the issue tried was with reference to these two hundred bales under the third item of said order." The judge in his charge to the jury refers to the order and letter as confirming the contract entered into originally by telephone, with the apparent acquiescence of both parties. Under the circumstances, we treat the order and letter as constituting a valid contract, it having been so considered by the parties and the presiding judge. No question as to the statute of frauds arises, and it is not in issue under the pleadings. The principal, if not the only question raised by the bill of exceptions which has not been expressly waived by the defendants relates to the proper construction of the words "if desired," in the written order of May 24, sent by the defendants to the plaintiff and accepted by the plaintiff in his letter of the same date.

The plaintiff contended, and the trial judge ruled in substance, that these words related solely to the time of shipment, and that the order was not to be construed as an option. The judge refused to rule that the contract was ambiguous and declined to submit the question to the jury as to whether the words "if desired" related to the time of shipment or gave the defendants the option of accepting or declining to take the two hundred bales as they might elect.

The defendants contended that the words used constituted an option to purchase, or at least that the contract was ambiguous, and that extrinsic evidence was admissible to explain its meaning as used by the parties.

It is well settled that the construction of a written contract which is plain in its terms and free from ambiguity presents a question of law for the court; and to leave the interpretation of such a contract to a jury would be manifest error. On the other hand it is a familiar principle that where a contract is so expressed as to leave its meaning obscure, uncertain or doubtful, evidence of the circumstances and conditions under which it was entered into are admissible, not to contradict, enlarge or vary its terms by parol, but for the purpose of ascertaining the true meaning of its language as used by the parties. *Strong v. Carver Cotton Gin Co.* 197 Mass. 53. *Sleeper v. Nicholson*, 201 Mass. 110. *Jennings v. Puffer*, 203 Mass. 534.

When the words "if desired" are considered in interpreting the meaning of the order, especially in view of the physical position in which they appear upon the order, we are of opinion that it could not be ruled that these words related only to the time of shipment of the waste, as matter of law, but that there was enough of doubt and uncertainty as to their meaning, and consequently of the construction of the contract as a whole, to require the submission of the question to the jury; and that evidence of the conditions and circumstances under which the contract was made and of the facts to which it related should have been admitted so far as they had a legitimate bearing upon the proper interpretation of the language used.

We do not decide whether the order and letter constitute a contract between the parties. See *Lyman B. Brooks Co. v. Wilson*, 218 Mass. 205.

Because of the exclusion of evidence of this character offered by the defendants, and because of the ruling that the contract did not constitute an option and that it was not ambiguous and therefore that its interpretation was not for the jury, the entry must be

Exceptions sustained.

IDA C. HEALEY, administratrix, vs. AMERICAN TOOL AND
MACHINE COMPANY.

Norfolk. January 18, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Agency, Existence of relation, Independent contractor. Negligence, Causing death.

In an action by an administrator for the conscious suffering and death of his intestate alleged to have been caused by negligence of the defendant, a manufacturing corporation, the plaintiff contended that his intestate when injured was in the employ of an electrical expert who was making tests for the defendant as an independent contractor, so that he might recover under R. L. c. 171, § 2, as amended by Sts. 1907, c. 375; 1911, c. 31; and the defendant contended and asked the judge to rule as a matter of law on all the evidence that the intestate was either in the general or in the special employ of the defendant, so that under the circumstances of the case recovery was

limited to a recovery for conscious suffering. After a review of the evidence, it was *held*, that there was evidence which would warrant findings in accordance with the plaintiff's contentions, and that the ruling asked for by the defendant was refused properly.

TORT for the conscious suffering and death of E. Arthur Healey alleged to have been caused on July 22, 1911, by negligence of the defendant. Writ dated September 29, 1911.

The declaration was in seven counts. The first and second counts alleged that at the time of his injury the plaintiff's intestate was in the employ of one Comfort A. Adams, the first setting forth a claim for damages due to his conscious suffering, and the second a claim under R. L. c. 171, § 2, as amended by Sts. 1907, c. 375; 1911, c. 31, for causing his death. The third count sought recovery only for the conscious suffering of the plaintiff's intestate and alleged that the plaintiff's intestate, when injured, was in the employ of the defendant, and that his injuries were caused by a failure of the defendant to furnish him with safe and suitable appliances and to warn and instruct him of the dangers of his employment. The remaining counts set forth claims under the various clauses of the employers' liability act for the conscious suffering and death of the plaintiff's intestate. Only the first three counts were submitted to the jury.

The case was tried before *McLaughlin, J.* There was evidence tending to show that at the time of the accident to the plaintiff's intestate he was in the exercise of due care, and that his injuries and death were caused by negligence of the defendant. Other material evidence is described in the opinion.

At the close of the evidence the defendant asked the judge to rule that on all the evidence the plaintiff was either in the general or special employment of the defendant. The ruling was refused.

The jury found for the plaintiff on the first count in the sum of \$4,000, and on the second count in the sum of \$8,000; and for the defendant on the third count. The defendant alleged exceptions.

C. S. Knowles, for the defendant.

W. I. Badger, (*C. M. Pratt* with him,) for the plaintiff.

PIERCE, J. There was no error in the refusal to rule as requested. There was direct, positive and inferential testimony from which the jury might find or infer that Professor Comfort A. Adams, for a stated sum per month, undertook to ascertain whether motors

purchased by the defendant, when used in connection with a basket or extractor made by the defendant, would do work which the defendant, in selling them in combination, specified that they would do; that in coming to a conclusion he or his assistant made many detailed tests, the choice of which or the determination of their adaptability and adequacy to the end to be attained varied with the particular fact, although not necessarily the ultimate one, to be ascertained; that the determination of the method to be pursued and of the means to be adopted, used or rejected rested in their absolute discretion and judgment; and that in the execution of the work neither he nor his assistant were bound or required to follow, if given, the defendant's direction.

The jury also might find upon positive, direct and inferential testimony that Healey the intestate was not in the general or special employment or service of the defendant; that as between Healey and the defendant there existed no contract, either express or implied in fact, upon which the relation of master and servant could be established or predicated.

In addition to the foregoing general finding, the jury could find specially that Healey was hired, paid, directed, instructed, advised and controlled in the performance of his work by Professor Adams; that the defendant never paid him, nor before the accident claimed that in paying Adams it was indirectly paying Healey as its servant; that it never had given Healey any direction or suggestion, or asserted the right to control him in the performance of the work which Adams had sent him to do, or claimed that he was bound to obey, as its servant, any proper order.

Under such finding, if made, Adams was an independent contractor, doing his own work in his own way, save so far as the terms of his contract otherwise provided. *Wood v. Cobb*, 13 Allen, 58. *Ward v. New England Fibre Co.* 154 Mass. 419. *Delory v. Blodgett*, 185 Mass. 126, 128. Healey under such findings was the servant of Adams and as such was not bound to obey the defendant and was not subject to its control. *Hooe v. Boston & Northern Street Railway*, 187 Mass. 67. *McLellan v. Boston & Maine Railroad*, 212 Mass. 153, 155.

The single exception to the admission of testimony is not argued and is treated as waived.

Exceptions overruled.

CHARLES L. SHEA, administrator, vs. EMMA A. MCEVOY.

Middlesex. January 18, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Landlord and Tenant, Landlord's liability for defective common elevator.
Negligence, Causing death, In use of elevator. *Elevator*.

In an action against the owner of a three tenement house for causing the death without conscious suffering of a child of a tenant occupying the first floor, it appeared that the child was struck, while in a common passageway in the cellar, by the falling upon him of a small elevator or dumb waiter which ran from the cellar through a shaft to the top floor, there being no enclosure about it in the cellar. At the trial it appeared that the elevator was used only by the tenant occupying the third floor, but there was evidence from which the jury were warranted in finding that it was adapted and intended to be used in common by the tenants occupying the second and the third floors and that it remained in the control of the defendant. *Held*, that the defendant owed to the members of the family of the tenant occupying the first floor and using the passageway in the cellar the duty of keeping the elevator in as good condition as it appeared to be at the beginning of his tenancy.

Upon further evidence at the trial of the same action, which tended to show that the fall of the elevator had occurred six months after the beginning of the tenancy of the father of the plaintiff's intestate, that a short time after the accident the broken ends of the hoist rope which had supported the elevator appeared frayed and torn, that pins, which had been adapted to pass through beams on the side of the elevator to steady and hold it in place when it was being hoisted or lowered, were broken, worn off, blackened and discolored, and that the landlord had admitted that he had made no repairs upon the elevator for fifteen years, it was *held* that a verdict for the plaintiff was warranted, because the jury were warranted in finding that the elevator and its appliances were defective at the time of the accident, that they gradually had become so during the fifteen years of their non-repair, and that they were not in as good condition as they had appeared to be when the tenancy of the intestate's father had begun.

TORT for causing the death without conscious suffering of the plaintiff's intestate, Thomas A. Shea. Writ dated October 27, 1910.

In the Superior Court the case was tried before *White, J.* The material evidence is described in the opinion. At the close of the evidence the defendant asked the judge to rule that on all the evidence the plaintiff could not recover. The judge refused so to rule. There was a verdict for the plaintiff in the sum of \$1,000; and the defendant alleged exceptions.

E. C. Stone, for the defendant.

T. J. Shea, for the plaintiff.

CROSBY, J. The plaintiff's intestate, a minor thirteen years of age, was killed on October 15, 1910. This action is brought to recover damages for his death without conscious suffering under R. L. c. 171, § 2, as amended by St. 1907, c. 375. The deceased was the son of the plaintiff and lived with his parents on the first floor of a three tenement house owned by the defendant. The second floor was occupied by a family named Lambert, and the third or top floor was occupied by one Miles and his family.

There was evidence that the cellar was divided into parts for the different tenants, and that the tenants reached the respective portions of the cellar used and occupied by them by means of a common passageway; that in order to go to Shea's cellar it was necessary to pass by an elevator, or dumb waiter, which ran from the cellar to the tenement on the third floor. The plaintiff's intestate was killed by reason of this elevator or dumb waiter falling upon him while he was in the passageway in the cellar. The elevator or dumb waiter consisted of a box or car about thirty inches wide, twenty-four inches deep and thirty-eight inches high, to the top of which was attached a rope which ran over a pulley wheel at the top of the shaft (in which the elevator was operated) above the third floor, the other end of the rope being attached to a weight which hung on one side of the shaft, which weight was hoisted or lowered as the car or box was moved. The elevator weighed about fifty pounds; the weight was of iron, eighteen inches long by nine or ten inches wide, and two inches thick. The hoist rope was one inch in diameter. Another rope was fastened to the bottom of the box or elevator for the purpose of hauling it down. It was raised and lowered entirely by hand. The shaft ran from the cellar floor up through the house, to a point above the third floor. There were openings from the shaft into both the second and third floor tenements, but there was no opening from the shaft into the first or ground floor. The front of the shaft in the cellar was entirely open for a distance of about six and one half feet above the bottom of the shaft; the bottom of the shaft and the cellar floor were on the same level.

There was evidence that on the night of the accident the boy was sent by his mother to the cellar to get some wood and coal;

that when he went to the cellar there was a rope which extended from the elevator shaft across the passageway to the bulkhead steps, where it was tied. There was some evidence to show that this rope had been placed there by a boy named Miles, who lived on the top floor. There was also evidence that the plaintiff's intestate, under the direction of his mother, cut the hoist rope, causing the elevator to fall upon him. On the other hand there was other evidence that the rope was not cut nor interfered with, but that as the boy was in the passageway opposite the opening at the bottom of the shaft, a rumbling sound above was heard, and the elevator fell, striking the boy and causing the injuries from which he died within a short time.

It could not have been ruled that the elevator was not furnished by the defendant for the common use of her tenants on the second and third floors. It is not contended that the tenant Shea had any right to use it. There was evidence that it was used only by the tenant Miles, who occupied the top floor, and that he was the only person who was authorized to use it. There was no evidence that it had been used by the tenants who occupied the second floor, but this is not conclusive; the building was so constructed that the elevator could be used by the tenants of the two upper floors. There was an opening on each of these floors; besides the defendant testified that she bought the house about sixteen years before the accident occurred; that the dumb waiter was in the house when she bought it, and that she told Mrs. Shea, the intestate's mother, that it was a dumb waiter to bring up coal and wood, and "that she never gave any orders not to use it." She further testified that from this dumb waiter there were openings into some of the flats where people could take out their wood and coal, and that these openings were on the second and third floors. The defendant also testified that "she had not replaced the ropes in this elevator in any way since she bought the house about fifteen years ago, and had never done any repairs on it during that time."

It was a question for the jury upon all the evidence whether the defendant authorized the tenant Miles solely to use the elevator, or whether it was furnished by her for the use of the tenants upon the second and third floors. If the jury found that it was furnished for the use of the tenants of both floors in common,

and that it remained under the control of the defendant, then the defendant owed to the tenant Shea and the members of his family the duty of keeping the elevator in as good condition as it appeared to be in at the beginning of Shea's tenancy. *Andrews v. Williamson*, 193 Mass. 92. *Domenicis v. Fleisher*, 195 Mass. 281. The tenancy of Shea, the father of the deceased, began in April, 1910; the accident occurred about six months later. The plaintiff testified that on the evening of the accident and a short time after it occurred, he examined the elevator and found that there was an upright beam or timber on each side of the elevator, in the centre of which beam was a slot or groove, and that on each side of the elevator on the outside were wooden pins, intended, when they were whole and in good condition, to fit into the slots and steady and hold in place the elevator when it was being hoisted or lowered; that these pins had become broken or worn off, and that the ends were black and discolored. There was further evidence that the broken ends of the hoist rope, where it had parted, were frayed and torn.

We are of opinion that the jury could have found that the elevator and the appliances connected therewith were in an unsafe and defective condition, and that they were not in as good a condition as they appeared to be in when Shea's tenancy began. The jury would have been warranted in finding that the hoist rope which broke and caused the elevator to fall upon the deceased had become gradually weaker during the fifteen years it had been in use down to the time of the accident.

The defendant contends that the negligence which caused the death of the plaintiff's intestate could not be found to be the act or neglect of the defendant, but that it was due to the intervening act of a third person in tying the rope across the passageway from the elevator to the bulkhead steps. There is nothing to show that such act had any connection with the falling of the elevator. If the deceased cut the hoist rope and allowed the elevator to fall upon him, it may be conceded that the plaintiff would not be entitled to recover. As to this contention the jury would seem to have found against the defendant.

We are of opinion that the presiding judge could not have directed a verdict for the defendant.

Exceptions overruled.

MATTHEW HERRIES vs. THOMAS BELL.

Middlesex. January 18, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Lord's Day. Gift. Dog. Bailment, Gratuitous bailee. Evidence, Presumptions and burden of proof. Conversion. Damages, In tort.

The gift of a dog voluntarily delivered to the donee on the Lord's day is valid.

If the lawful possessor of a dog with the consent of its owner delivers it into the possession of its former owner and no more appears, it cannot be inferred that the purpose of this delivery was to revest the title in the former owner by way of gift, sale or otherwise, and such delivery creates at the highest a gratuitous bailment revocable at the pleasure of the bailor without demand or notice.

If a dog, in response to a whistle of its former owner, leaves its lawful possessor and follows its former owner to his house where the former owner detains the dog against the demand of its lawful possessor, this constitutes a conversion of the dog for which its lawful possessor may maintain an action against its former owner.

The lawful bailee of a chattel or domestic animal who had possession of it with the consent of the owner, in an action of tort against one who wrongfully has deprived him of such possession, may recover the full value of the chattel or animal at the time of the conversion.

TORT for the alleged conversion of a Scotch collie dog named Duke. Writ in the District Court of Central Middlesex dated November 20, 1912.

On appeal to the Superior Court the case was tried before *Brown, J.* The facts which could have been found upon the evidence are stated in the opinion. The plaintiff's wife testified that the action was brought with her approval. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. Upon all the evidence in the case the verdict should be for the defendant.

"2. Upon all the evidence in the case the jury can assess only nominal damages.

"3. There is no evidence of the value of the plaintiff's possession of the dog in question.

"4. There is no evidence from which the jury can assess the amount of damage which the plaintiff sustained by having the possession of the dog in question taken from him by the defendant in the manner described by the plaintiff's evidence."

The judge refused to make any of these rulings, and instructed the jury, among other instructions to which no exception was taken, that (1) the plaintiff had shown sufficient evidence of possession to warrant the jury in finding a verdict for him, provided the dog did not belong to the defendant, and (2) that, if the plaintiff had possession of the dog and if he or his wife owned it, the defendant could not dispute the allegation that the dog was the property of the plaintiff, if the plaintiff's wife did not dispute the plaintiff's right to sue for the full value of the dog.

The jury found a verdict for the plaintiff in the sum of \$218.80; and the defendant alleged exceptions to the refusal of the judge to make the rulings requested by him and to the instructions stated above.

The case was submitted on briefs.

S. R. Cutler & H. W. James, for the defendant.

A. E. McCleary, for the plaintiff.

PIERCE, J. On a Lord's day in 1910, the defendant voluntarily gave and delivered to the plaintiff's wife a Scotch collie dog, for the alleged conversion of which this action was brought.

The gift, complete in itself, contains no element of labor, business or work. It is not an act of contract; it does not give rise to any contractual obligation, and it is not in violation of R. L. c. 98.

In May, 1911, the dog was delivered into the possession of the defendant by the plaintiff, with the consent of the plaintiff's wife, and was retained by the defendant until the autumn of 1911, when, secretly, with the approval of the plaintiff's wife, the plaintiff took it away.

The bill of exceptions does not state, nor can it be inferred therefrom, that the purpose of this delivery to the defendant was to revest the title by way of gift, sale or otherwise. Such delivery created, at the highest, a bailment at will revocable without demand or notice at the pleasure of the bailor.

The dog, while in the possession of the plaintiff, of its own volition or in response to the whistle call of the defendant, followed the defendant's team to the home of the defendant, and there was detained, under a claim of ownership, against the demand of the plaintiff.

At the time the dog followed the team at the call of the defend-

ant the plaintiff had the possession, and, by reason of the wife's consent thereto, the right to possession as against all persons other than the wife. The taking of the dog, and the refusal to deliver it on demand under an assertion of title, either or both, was a conversion. The plaintiff could maintain the action because of the wrong to his possession, and if also the right to possession were needed, the wife at the trial testified that she had granted it.

The plaintiff as bailee was entitled to recover full damages. *Pratt v. Boston Heel & Leather Co.* 134 Mass. 300. There was no error in the refusal to give the rulings requested or in those given.

Exceptions overruled.

H. THEODORE FLETCHER vs. JOHN H. STORER & others.

Suffolk. January 20, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Contract, Rescission, Performance and breach. Limitations, Statute of.

Where a person, who has paid the purchase price for a certain lot of land and is entitled to a deed under a contract in writing by which the seller has agreed "to pay all taxes until deed is given," makes a demand for a deed but afterwards waives immediate performance on account of the absence of necessary parties, and thereafter for a period of twelve years, although he makes oral and written demands for a deed, receives none either because of the continued absence of necessary parties or for some other reason not attributable to his own fault, and then demands a deed which the seller refuses to give unless the purchaser pays the taxes which have been paid by the seller since the payment of the purchase money, this gives the purchaser the right to rescind the contract of sale and demand back the purchase money paid by him, and, on the refusal of its payment, to recover the amount in an action of contract, although the defendant sets up the statute of limitations; because the plaintiff's delay in making his final demand for a deed was not due to his own fault, and the statute of limitations did not begin to run until his final demand was refused.

CONTRACT for \$280, and interest, paid by the plaintiff's assignor, one Alberta McLeod, under a contract in writing between her and the defendants, dated August 14, 1894, whereby the defendants agreed to convey to her a certain lot of land numbered 542 on a plan of The Heights in the part of the town of Revere which is

known by that name, which contract the defendants wholly failed to perform. Writ dated March 9, 1910.

The defendants' answer, besides a general denial, set up the defence of the statute of limitations.

In the Superior Court the case was submitted to *Ratigan, J.*, upon an agreed statement of facts, the substance of which is stated in the opinion. The judge ruled that the action was not barred by the statute of limitations and found for the plaintiff in the sum of \$372.12. By agreement of the parties he reported the case for determination by this court. If the ruling and finding of the judge were correct, judgment was to be entered thereon; otherwise, judgment was to be entered for the defendants.

C. F. French, (A. R. Smith, Jr., with him), for the defendants.

C. H. Donahue, for the plaintiff.

PIERCE, J. On December 17, 1896, the plaintiff's assignor paid the last instalment of the principal sum to be paid under the agreement. Concurrently therewith she had the right to a conveyance of the premises by a deed in the form annexed to the agreement. In the exercise of this right she made a demand upon the defendants, but waived performance, stating that by reason of the absence of necessary parties the deed could not be given.

The defendants were then and ever since have been in possession of the premises. The attitude of the parties in reference to a conveyance between December, 1896, and some time in 1908 does not appear in the agreed statement of facts, but from all the circumstances, including oral and written demands, it may be inferred either that the inability of the defendants to give a deed continued because of the absence of necessary parties, or that there were other causes of inaction not attributable to the vendee's neglect. On July 7, 1908, the vendee assigned to the plaintiff all her right, title and interest in and to the agreement for sale, and it is agreed that the plaintiff has all the assignor's rights.

In September, 1908, the plaintiff demanded a deed and was told that he must pay the taxes and sewer assessments which had been paid by the defendants since the date of the payment of the last instalment of the principal. This the plaintiff refused to do and demanded the money paid for the conveyance; the defendants refused to return the money, and this action was brought.

Were it not for the fact, that the delay in demanding a con-

veyance or in insisting upon the defendants making an absolute refusal was excusable, it is possible that the vendee's right to rescind and with it the right to recover the money paid would have been barred. Under the circumstances of this case the statute has not run. *Codman v. Rogers*, 10 Pick. 111, 119, 120. *Campbell v. Whoriskey*, 170 Mass. 63, 65.

The defendants further say that the plaintiff should not recover because he did not offer to repay the amount paid by them for taxes. There is nothing in this contention. The defendants had the premises and the use of the land and the plaintiff's money, and had agreed as a part of the contract for sale "to pay all taxes until deed is given."

In accordance with the terms of the report judgment is to be entered for the plaintiff in the sum of \$372.12.

So ordered.

BROADWAY NATIONAL BANK OF CHELSEA vs. EDWARD HEFFERNAN
& trustee.

Suffolk. January 20, 21, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Bills and Notes, Alteration, Holder in due course. *Bank*. *Agency*, When knowledge of agent is constructive notice to principal, Scope of authority. *Notice*, Constructive.

The addition upon the face of a negotiable promissory note of the words "with interest at 6%" here was conceded to be a material alteration within the meaning of R. L. c. 73, § 142.

Where a bank discounted a negotiable promissory note which was complete and regular upon its face and was not overdue and had not been previously dishonored, and it afterwards was discovered that before such discounting the cashier of the bank had made a material alteration in the note, of which he procured the discount for his own fraudulent purposes, but that no other officer or employee of the bank had any information as to the alteration or as to the cashier's personal interest in the note, it can be found that the bank took the note in good faith and for value without notice of any infirmity in the instrument or defect in the title within the meaning of R. L. c. 73, §§ 69, 73, and therefore was a holder in due course, the knowledge of the cashier not having been constructive notice to the bank because the cashier was engaged in committing an independent fraudulent act on his own account. Following *Indian Head National Bank v. Clark*, 166 Mass. 27.

CROSBY, J. The only question involved in this case is whether an alteration in the note declared on is a defence to the action.

The alteration, which was made by direction of the cashier of the plaintiff bank, consisted in adding to the note the words "with interest at 6%." This was a material alteration, and is conceded to be such by the plaintiff. R. L. c. 73, § 142.

The case was tried by a judge of the Superior Court without a jury; he made a finding for the plaintiff for the amount due upon the note, in accordance with its original tenor, and reported the case to this court.

There was evidence to show that the note in suit and another note for the same amount were made by the defendant for the accommodation of one Hastings, the cashier and a director of the plaintiff bank. It was understood by Hastings and the defendant that the former would endeavor to get the notes discounted by the plaintiff bank.

The notes were signed and delivered by the defendant to Hastings on February 20, 1911, and were discounted by the bank on February 27, after having been approved for discount by a committee of the directors. Two or three days before the notes were discounted Hastings caused the addition "with interest at 6%" to be written upon the notes. The proceeds of the notes were paid to Hastings at his request by the teller of the bank, and Hastings used the money "in whole or in part to take up certain questionable checks or drafts in the bank for which he considered himself responsible, instead of using it to purchase stock in the bank, which was the original scheme between himself and the defendant."

The record states that at the meeting of the committee of the directors, held on February 27, 1911, when the discount of these notes was authorized, "No member of the committee or officer of the bank then saw the notes to examine them or to observe the alterations thereon, except said Hastings, and he did not disclose to the committee or to any other officer or employee of the bank, any information as to the alteration of the notes or concerning his personal interest in them, or that he wanted them discounted for the purposes herein set forth. Said Hastings did not tell the exchange committee or other officers of the alteration of the notes and of the purpose for which they were given by the defendant or of the use

to be made of the proceeds, because, he testified, if he had, he knew the committee would not have authorized their discount; that he knew it was his duty to tell the committee all he knew about the notes, but he concealed the information in order to secure the discount of the notes."

From the foregoing and other evidence recited in the report, it clearly appears that Hastings's conduct in this transaction, including his fraudulent alteration of the notes and the deception practiced by him in procuring their discount, was to carry out his own selfish purposes. He did not act for the bank or in its behalf in this transaction, but acted adversely to its interests.

The first of the two notes so fraudulently altered was paid at maturity by the defendant without knowledge by him that it had been altered. The second note, which matured in three months, is the note in suit. It was undisputed that when the plaintiff took the note it was complete and regular on its face and was not overdue and had not been previously dishonored when taken, and that it was taken for value. In addition the court was warranted in finding that it was taken in good faith and without notice of any infirmity in the instrument or defect in the title. R. L. c. 73, §§ 69, 73.

The record shows that the defendant received no benefit on account of the discount of either of the notes in question; still, without considering the evidence further in detail, we are of opinion that the presiding judge was warranted in finding that the plaintiff was a holder in due course, not a party to the alteration, and was entitled to enforce payment of the note according to its original tenor. R. L. c. 73, § 141. *Fillebrown v. Hayward*, 190 Mass. 472.

The defendant contends that the act of Hastings, the cashier, in altering the note, was the act of the bank and that his knowledge was its knowledge. We cannot agree with this contention, and it is not sustained by the cases cited upon the defendant's brief. It is well settled that, while generally notice to an agent when acting for his principal of facts affecting the character of the transaction is constructive notice to the principal, still "there is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act." *Allen v. South Boston*

Railroad, 150 Mass. 200, 206. *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 333.

The case at bar is easily distinguishable from *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, and is governed by *Indian Head National Bank v. Clark*, 166 Mass. 27.

It follows that judgment is to be entered for the plaintiff for the amount due upon the note according to its original tenor, in accordance with the finding of the judge of the Superior Court.

So ordered.

E. C. Jenney, (S. Robinson with him,) for the defendant.

A. E. Pillsbury, W. Howland & C. A. Warren, for the plaintiff, were not called upon.

DENISE ROBICHAUD, administratrix, vs. NEW YORK, NEW HAVEN,
AND HARTFORD RAILROAD COMPANY.

Middlesex. January 21, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSSBY, & PIERCE, JJ.

Negligence, Railroad, In freight yard. *Evidence*, Of rules, Matter of conjecture.
Practice, Civil, Exceptions.

In an action against a railroad corporation by the administrator of the estate of a flagman in a freight yard of the defendant, under St. 1909, c. 514, §§ 127 *et seq.*, for causing the death of the plaintiff's intestate, one of the plaintiff's witnesses testified, on his cross-examination by the defendant, that he had observed the intestate while he was performing the duties of a flagman; that the intestate appeared to be familiar with the rules of the company; that all the men were furnished with a book of rules; that he saw a book in the intestate's hands which was similar to the defendant's book of rules in respect to form, color and superscription, but that he did not see the book open. Thereafter the judge, against the plaintiff's objection, permitted the defendant to read to the jury from a book similar in appearance to the one seen in the intestate's hands certain rules which had an important bearing on the question of the intestate's due care. At the close of the evidence the judge ordered a verdict for the defendant and the plaintiff alleged exceptions. *Held*, that the evidence justified the judge's preliminary finding and ruling allowing the rules to be read to the jury; but that the defendant had no right to rely, in support of the ordering of the verdict, on any inference of the intestate's knowledge of the rules that were read to the jury; because, if the case had been left to the jury, it would have been within their province to say whether they would draw such an inference, and because they would have had the right to disbelieve the witness's statement that the intestate had a book of rules in his hands.

In an action against a railroad corporation by the administrator of the estate of a trainman in a freight yard of the defendant, under St. 1909, c. 514, §§ 127 *et seq.*, for causing the death of the plaintiff's intestate, it appeared that the intestate was a man of large experience in handling trains, who had worked in the same division of the freight yard in which he was killed for seven or eight years, that at the time of the accident he was at work somewhere upon or near fourteen cars that had been shunted upon a side track when nine more cars were sent down upon them by their own momentum, that their impact pushed the fourteen cars about five feet, and that thereafter the dead body of the intestate was found beneath the second of the fourteen cars counting from the end away from the nine cars that had come down. There was nothing to show where on the top of or between or under the fourteen cars the intestate was or what he was doing when the nine cars came in contact with the fourteen cars. *Held*, that a verdict must be ordered for the defendant, because it was a matter of conjecture whether the intestate at the time he was killed was engaged in the performance of his duties and was in the exercise of due care.

PIERCE, J. This is an action of tort brought on October 10, 1910, under the employers' liability act, St. 1909, c. 514, §§ 127 *et seq.*

At the close of the plaintiff's case the defendant rested, and the judge at its request directed the jury to find a verdict for the defendant.

A witness for the plaintiff, one Brown, testified on cross-examination that he had observed the intestate while he was performing the duties of flagman; that he appeared to be familiar with the rules of the company; that all the men were furnished with a book of rules; that he saw a book in the intestate's hands, and that it was similar to the books of rules of the defendant in respect to form, color and superscription, but he did not see the book open.

The judge against the objection of the plaintiff permitted the defendant to read to the jury, from a book in appearance similar to the one seen in the intestate's hands, rules numbered 777 and 835, each a rule of importance in the determination of the intestate's due care.

The above facts justified the judge's preliminary ruling and submission to the jury, but whether the intestate had or had not knowledge of the specific rules as read remained for the jury's determination. They might or might not infer such knowledge; indeed they might disbelieve the statement of the witness that the intestate appeared to have knowledge of the rules, or had in his hands a book of rules. It follows that rules 777 and 835 should be

disregarded in considering whether the judge was right in directing a verdict for the defendant.

The intestate was a man of large experience in railroading. He had worked in this division and in this yard, at Mansfield, for seven or eight years. He had been a flagman on this nightly "run" for three months. At times he had been an emergency conductor and had taken trains in and out of the Mansfield yard.

On the night of the intestate's death a freight train of twenty-four cars had come from East Providence to Mansfield. It arrived somewhere between three and four o'clock in the morning. It backed from the main track, over side track No. 3, to side track No. 5, leaving there the caboose and three cars. The conductor himself "cut" the caboose and three cars, and notified the intestate that they could pick up the cars on track 5; then the intestate rode the three cars to their destination on the extension of track 3, and on arriving there gave the conductor the signal that all was right, that is to say, their position would not interfere with any movement on the other track. The engine then pulled the remaining twenty cars back upon track 3, and stood there.

The conductor meanwhile went to the office to get his way bills and to ascertain what cars he was to take out. At the time of the accident fourteen cars already had been placed on track 5. The yard brakeman brought to track 5 from track 7 nine cars, pulled the pin on the car next to the engine, the engine gave a little push, and the cars ran by their own momentum on a grade down on those already there. Their impact pushed the cars about five feet.

The yard brakeman rode the cars. He stood on the first one coming down, which was a flat coal car. He had a lantern on the footboard on the outside of the car, and the lantern was visible to any one down the track. He saw nobody and did not know of the intestate's being on top, between or under the cars.

The intestate was found, dead, beneath the second car of the fourteen cars farthest away from the cars as they came down. No one saw him from the time the conductor left him on track 3 until he was found.

There is no testimony in the record to show where the intestate was at the time of the contact of the nine cars with the fourteen cars. It reasonably may be argued that his injury was due to the force of the impact, but it is at least doubtful if it be proven.

There is no testimony to show where he was at the time of the accident other than that he was in a position to fall or be dragged beneath the cars. He might have been setting or unsetting the brake on the top of the car. He might have been on top of the car for some other purpose and have fallen between the cars. He might have been under or between the cars.

It is argued that at the moment of the coming together of the cars he was engaged in coupling the air hose. It appears that the trainmen of the train which was to take out the assembled cars had no part in its making up. As soon as the train was fully made up, that is, as soon as all the cars were collected on one track and the engine was attached, perhaps sometimes before the engine actually was connected, it was the duty of the trainmen to couple the air hose between the several cars. There was no evidence that it was the practice to air-couple the cars before all were assembled. It is not reasonable to believe that a trainman, with the knowledge and experience of the intestate, was occupied in air-coupling cars while the yard men were engaged in making up the train; or to believe that he thought the fourteen cars were all the cars which were to constitute the train.

Whether the intestate was engaged in the performance of his duties or was in the exercise of due care is a matter of conjecture and speculation. *Cox v. South Shore & Boston Street Railway*, 182 Mass. 497.

Exceptions overruled.

J. F. Cavanagh, for the plaintiff.

J. L. Hall, for the defendant, was not called upon.

WALTER A. TAYLOR & another vs. PIERCE BROTHERS, LIMITED.

Bristol. January 21, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Practice, Civil, New trial, Exceptions. Res Judicata. Evidence, Matter of conjecture.

Where, in an action of tort for personal injuries or for causing death, an exception to a refusal of the presiding judge to order a verdict for the defendant is sustained on the ground that there was no evidence that the person injured or killed was in the exercise of due care at the time of the accident that caused his injuries or death, the decision of this court is "the law of the case" so far as the evidence then passed upon is concerned, and at a new trial of the case the plaintiff, in order to have a right to go to the jury, must present evidence which differs in substance from that produced at the former trial, and which, if then produced, would have made necessary a different decision by this court.

Where, in an action against the proprietor of a mill for causing the death of a boy employed as a back boy, an exception to the refusal of the presiding judge to order a verdict for the defendant was sustained on the ground that the conduct of the boy at the time of the accident that caused his death was a matter of conjecture so that there was no evidence warranting a finding that he was in the exercise of due care, additional evidence, at a new trial of the case, that two spinners on two occasions were heard to call the boy "dope," "crazy" and "nuts," assuming that it was admissible as showing estimates of the decedent's powers of apprehension and comprehension, does not tend to show what the boy was doing at the time of the accident or to make the question of his conduct at that time any less a matter of conjecture.

PIERCE, J. When this case first was tried in the Superior Court, the defendant at the close of the evidence requested a ruling that "upon the whole evidence the plaintiffs cannot recover." The request was refused and the defendant duly excepted. Following a verdict for the plaintiffs the question of law saved by the defendant came to this court. *Taylor v. Pierce Brothers, Ltd.* 213 Mass. 247. The exception was sustained.* The case was

* The action was brought by the father and mother of a boy, as his next of kin, for causing his instant death on August 16, 1910, when he was employed as a back boy in the defendant's cotton mill in New Bedford. It appeared that in some unexplained manner the boy was struck and killed by the counterweight of an elevator that in ascending passed through trap doors in the different floors of the mill. The boy's lifeless body was found with the head partially in a hole in the mule room floor made for the passage of the counter-

tried again with a jury in the Superior Court, and at the close of the evidence the defendant requested the judge to rule that "upon the whole evidence the plaintiffs cannot recover." The judge refused so to rule, and the defendant duly excepted. After a verdict for the plaintiffs, the defendant brings the question of law to this court.

The former adjudication of this court that the son of the plaintiffs was not in the exercise of due care necessarily followed a consideration of every fact and inference of fact to be found in or inferred from the whole evidence.

The conclusiveness of such a decision is not determined, nor is it enlarged, limited or circumscribed by the exposition of principles contained in the opinion, by the logic of immutable fact or by any fallacies of induction. For that case it stands the rule and measure of right, binding on court and parties. It is "the law of the case." *Snell v. Dwight*, 121 Mass. 348, 349. *Booth v. Commonwealth*, 7 Met. 285. 3 Cyc. 395, *et seq.*

Upon a new trial, after a decision, no question is open upon the same or on what is in substance the same evidence. The plaintiffs, in order to get to the jury, must produce for their consideration evidence which, had it been produced at the former trial in addition to that offered, would have necessitated a different conclusion by this court. Measured by this rule the plaintiffs must fail.

The testimony bearing upon the decedent's due care which was heard at the second trial differed for the most part from that produced at the first trial in phraseology only. In substance it was the same. In addition two witnesses stated that they had heard two spinners, on two occasions, while speaking to the decedent, call him "dope," "crazy" and "nuts." What circumstances led to the use of such appellations does not appear. Whether used as indicating the momentary irritation and vexation of the speaker, or as an ejaculatory opinion of the decedent's mental ability, is a matter of pure conjecture.

weight and with the counterweight resting upon the side of the face. In the previous decision cited above it was held that, the conduct of the boy before and during the opening of the trap doors being a matter of pure conjecture, there was no evidence that he was in the exercise of due care at the time of the accident.

Accepting the statements, without passing upon their admissibility, as estimates of the decedent's powers of apprehension and comprehension, it is as difficult now as before to determine what he was doing and what he was about. The case of *Maguire v. Fitchburg Railroad*, 146 Mass. 379, and the cases of which it is the type, go no farther than to decide that the circumstances of any given accident may be such as to supply by reasonably necessary inference the absence of direct evidence of the decedent's due care. This presumption of fact does not arise in this case. From whatever side, from whatever angle the testimony is examined, our reason remains in doubt.

It follows that the judge should have directed the jury to return a verdict for the defendant, and the exception taken to his refusal so to do must be sustained. We are further of opinion that judgment should be entered for the defendant under St. 1909, c. 236; and it is

So ordered.

A. J. Jennings, for the defendant.

C. R. Cummings, for the plaintiffs.

MELVINA DRAKES vs. GEORGE L. TULLOCH.

Suffolk. January 21, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Negligence, Of dentist. Pleading, Civil, Variance.

Where, at the trial of an action by a woman against a dentist for injuries alleged to have been caused by the plaintiff being infected with syphilis from dental instruments used by an employee of the defendant in treating her without the instruments having been sterilized properly before such use, there is evidence tending to show that before being treated the plaintiff was free from the disease, and that during an operation on her teeth by the defendant's employee she became infected with it; and, although there is evidence that it was the practice of the defendant to have all instruments used in his office sterilized by boiling and in other ways, there is no evidence as to what was done to sterilize the instruments used on the day when the plaintiff became infected, a verdict for the plaintiff is warranted. Following *Bates v. Dr. King Co.* 191 Mass. 585.

If it is alleged in the declaration in an action of tort by a woman against a dentist that the "defendant by his servants and agents conducted himself in and about treating plaintiff's teeth so unskilfully, recklessly, negligently and unprofessionally, that . . . the instruments or appliances which defendant used in treating her teeth were unclean and unfit for use, and by reason of the contact thereof with plaintiff's mouth she was infected with syphilis," and if upon the evidence at the trial the jury find that the plaintiff was treated at the defendant's office by an employee of the defendant, that she then became infected with syphilis, not through negligence of the defendant's employee who treated her, but through negligence of some person employed by the defendant whose duty it was to clean and sterilize the instruments used in treating her, there is no variance between the declaration and the proof.

TORT for personal injuries alleged to have been caused by the plaintiff becoming infected with syphilis when being treated in the defendant's dental offices. Writ dated April 14, 1913.

The second count of the declaration, which was the only count submitted to the jury, was as follows:

"And the plaintiff says that on or about the period from the middle of January to and including the seventh day of February, 1910, she employed defendant to attend her and to treat her teeth, defendant claiming to be a dentist, and claiming great skill in his profession; that defendant in consideration of the reward paid him by plaintiff, promised and undertook to faithfully, skilfully and carefully treat her said teeth; that in violation of his said duty and promises, defendant by his servants and agents conducted himself in and about treating plaintiff's teeth so unskilfully, recklessly, negligently and unprofessionally, that, without any fault on her part and while she was in the exercise of due care, the instruments or appliances which defendant used in treating her teeth were unclean and unfit for use, and by reason of the contact thereof with plaintiff's mouth she was infected with syphilis, whereby she was greatly injured in her health and constitution, and made to suffer great pain of mind and body, and from the time said injury occurred has been in bad health, has been injured in her capacity to labor, has required medical attendance and treatment and will need the same for a long time to come, has been forced to pay out large sums for medicines and has been subjected to great expense and great humiliation and mental anguish, and is permanently injured, all to her great damage."

The case was tried in the Superior Court before *Stevens, J.* The material facts and the findings of the jury in answer to special

questions submitted to them are stated in the opinion. At the close of the evidence, the defendant asked the judge to rule that upon all the evidence and the pleadings the plaintiff was not entitled to recover. The ruling was refused. The jury found for the plaintiff in the sum of \$2,500; and the defendant alleged exceptions.

E. I. Taylor, for the defendant.

J. F. Neal, (*C. H. Johnson* with him,) for the plaintiff.

CROSBY, J. This is an action of tort to recover damages for the alleged negligence of the defendant. The plaintiff went to the defendant's office in January and February, 1910, and there had some dental work done by the assistants of the defendant. The evidence tended to show that the plaintiff's last visit to the defendant's office was on the morning of February 7, 1910, on which date a gold crown was fitted for her by Dr. Webber, an employee of the defendant; that in fitting the crown an instrument was used which cut her gum so that it bled, and about three weeks afterward sores appeared in her mouth, one of them being at the point where the gum was cut. There was evidence from which it could have been found that she then was suffering from syphilis, a contagious disease, and that this disease can be communicated in various ways, including infection by the use of dental instruments, if there is syphilitic virus on the instruments and it comes in contact with any cut in the mouth or other part of the body.

The undisputed evidence showed that it was the practice among dentists to sterilize their instruments by boiling, or by other ways, before they are used.

The jury, in answer to special questions submitted to them, found that Dr. Webber was in the defendant's employ in February, 1910, and that the plaintiff was not infected with syphilis through negligence of Dr. Webber, and that she was infected with syphilis through the negligence of some person employed by the defendant, whose duty it was to clean and sterilize Dr. Webber's dental instruments during the night.

There was evidence that the plaintiff had been free from this disease before her visits to the defendant's office, and that she became infected by reason of the operation on her teeth.

While the defendant offered evidence that it was his practice to have the instruments used in his office sterilized by boiling and in other ways, it does not appear what, if anything, had been done

to sterilize the instruments immediately before the morning of February 7, 1910.

We are of opinion that a verdict could not have been directed for the defendant, but that the questions whether the plaintiff contracted the disease in the defendant's office, and if so, whether it was due to the negligence of the defendant in failing to use clean and suitable instruments, were upon the evidence questions properly submitted to the jury.

The case at bar is very similar to that of *Bates v. Dr. King Co.* 191 Mass. 585, and is governed by it.

The second count of the declaration was broad enough to cover a finding that the plaintiff was infected by reason of the negligence of some person in the employ of the defendant, whose duty it was to clean and sterilize the instruments used; there was no variance between the declaration and the proof.

As the only exception argued is to the refusal of the court to rule that upon all the evidence and pleadings the plaintiff is not entitled to recover, the other exceptions may be treated as waived.

Exceptions overruled.

HELEN REGAN vs. SUPERB THEATRE, INCORPORATED.

JAMES C. REGAN vs. SAME.

Suffolk. January 21, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Negligence, Staging over highway in front of theatre, Independent contractor. Agency.

Where the proprietor of a theatre made a contract with a painter for the painting of ornamental work over the entrance to the theatre and the contract provided that the painter should furnish and erect the staging necessary for the work, and where a temporary and movable staging, built and entirely controlled by the painter and made of trestles with boards laid across between them but not fastened, was used by the painter for the work and, at a time when the sidewalk was crowded and about fifteen minutes after the workmen of the painter had left the staging unwatched and unguarded, it was tipped over, apparently by a gust of wind, and fell upon one who was entering the theatre, the proprietor of the theatre is not liable for the personal injuries so received.

PIERCE, J. These are two actions tried together in the Superior Court. The first is brought to recover for personal injuries received by the plaintiff Helen Regan from the upsetting or tipping over of a staging erected by the employees of the Keighley Metal Ceiling and Roofing Company, an independent contractor, for use by them in connection with the painting of a marquee over the entrance to the defendant theatre. At the time of its tipping over it stood on the sidewalk, parallel to the entrance to the theatre and somewhat nearer to the entrance than to the curbstone. The men who worked upon it had left it ten or fifteen minutes before, unwatched and unguarded.

The plaintiff left her home on the afternoon of February 28, 1912, to see the show at the Superb Theatre. She passed by the side of the staging, arrived in front of the entrance and was about to enter, when the staging, seemingly lifted by a gust of wind, tipped over upon her and threw her into the corner of the doorway. The staging was built of two trestles, each eight or nine feet high, standing eight or nine feet apart, connected by one or two boards or planks nine inches wide and one and a half or two inches thick, and not at either end fastened to the trestles. The ends of the boards or planks rested upon the second rung from the top of the trestles, and the horizontal line of the plank was about seven feet above the sidewalk. The staging could be moved about as needed. It is not disputed that the staging was owned, built and entirely controlled by a contractor who undertook in a contract with the defendant to paint the marquee and to furnish and erect the staging necessary for his own men.

In the furnishing and erection of this staging the defendant had no part. In the painting it was interested only to see that the contract was performed in accordance with its terms. There was no occasion to anticipate that injurious consequences necessarily might follow from the placing and use on the sidewalk of a staging adequate for the work expected or required to be done by men who were to paint the marquee which was to be placed over the entrance to the theatre building. In fact no harm came from the form of the structure, from the manner of its use, or from the careless acts of men in the execution of work while upon it. No one could foresee that the men would leave the staging unwatched

and unguarded in the middle of a crowded sidewalk for more than a momentary period of time.

This case in principle is governed by *Davis v. John L. Whiting & Son Co.* 201 Mass. 92, and does not fall into the class represented by *Woodman v. Metropolitan Railroad*, 149 Mass. 335, or into that of *Frost v. McCarthy*, 200 Mass. 445. There was no liability on the part of the defendant, and the verdict for the defendant was rightly ordered.

The single exception to the admission of testimony was not argued, and we treat it as waived.

In the second case the father of the plaintiff in the first action seeks to recover for medical expenses and loss of services. His right is dependent upon the right of his daughter. *Lundergan v. New York Central & Hudson River Railroad*, 203 Mass. 460. *Gardner v. Boston Elevated Railway*, 204 Mass. 213, 218.

Exceptions overruled.

T. J. Ahern, for the plaintiffs.

F. P. Garland, for the defendant.

HELEN REGAN vs. KEIGHLEY METAL CEILING AND ROOFING
COMPANY.

JAMES C. REGAN vs. SAME.

Suffolk. January 21, 1915. — February 25, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Negligence, Staging over highway. Way, Public.

If a painter erects over a sidewalk in front of a theatre a temporary staging built of upright trestles with planks laid from one trestle to another and not fastened and, when the sidewalk is crowded, his workmen leave the staging unprotected and unguarded for ten or fifteen minutes during which a gust of wind blows it over and it strikes and injures a person entering the theatre, in an action against the painter for the injuries so received, the jury are warranted in finding that the plaintiff was in the exercise of due care and that the defendant was negligent.

PIERCE, J. The facts in these two cases are set out in the case of *Regan v. Superb Theatre, Inc.*, ante, 259. It is clear that the

jury properly could find that it was negligent to leave the staging unprotected and unguarded for ten or fifteen minutes in the middle of a crowded sidewalk. It is equally clear that the jury could find that the plaintiff was in the exercise of due care.

Exceptions overruled.

F. P. Garland, for the defendant.

T. J. Ahern, for the plaintiffs.

BENJAMIN F. BRIGGS vs. CHARLES F. ADAMS, 2ND, & others,
trustees.

Suffolk. October 5, 1914. — February 26, 1915.

Present: RUGG, C. J., LORING, DE COURCY, & CROSBY, JJ.

Evidence, Of title, In rebuttal. *Practice*, Civil, Order of evidence.

At the trial of an action by the owner of land near the sea for damages alleged to have been caused by water flooding that land by reason of a break in a dam which the defendant through his negligence had allowed to become defective, the only evidence which the plaintiff offered to prove that the defendant owned the dam or was under any obligation to repair it was a deed conveying certain land to the defendant and mentioning a dam, from which it was impossible to identify the land therein described with land including the dam in question, and evidence that after the break in the dam two laborers employed by the city where the dam was had repaired it, that at some time some laborers, who had been seen working on premises belonging to the defendant, worked upon the dam, but whether they had so worked before or after the break and whether they worked with the city's laborers did not appear. The evidence of the defendant tended merely to show that at one time the land including the dam had belonged to another person. At the trial and at the argument before this court the defendant denied ownership of and responsibility for the dam. A verdict was ordered for the defendant. *Held*, that the verdict was ordered rightly.

Where, at the trial of an action of tort for damages resulting from a break in a dam, it is a part of the plaintiff's case to prove that the title to the dam is in the defendant, it is within the discretion of the trial judge to refuse to permit the plaintiff to introduce in rebuttal evidence which tends merely to support that part of his case in chief and has no tendency to explain or control any evidence offered by the defendant.

RUGG, C. J. This is an action of tort to recover damages alleged to have been sustained through a nuisance caused by the

defendants,* in that they maintained a dike for the purpose of excluding the waters of the sea from certain low lands in Chelsea in such negligent manner that it gave way, whereby property of the plaintiff was injured. It is stated in the bill of exceptions that the plaintiff, "to prove defendant's [defendants'] title, control and claim of ownership in the adjoining dike and surrounding premises, put in evidence its [their] answer as respondent [respondents] to the plaintiff's petition to register his part of said dike in said Land Court, and the deed referred to in said answer, from H. M. Whitney to defendant trustees, and a part of the plan referred to in said deed." This appears to be all the evidence upon this branch of the case. The description given in the deed is as follows:

"A certain parcel of land situate in Chelsea in the County of Suffolk, and Commonwealth of Massachusetts and bounded and described as follows: beginning at the easterly corner of lot 57 Williams Street, as shown on Shearer's plan of lands of the Winnisimmet Company and others, recorded with Suffolk Deeds at the end of Book 616, thence running Southerly by land now or late of said Winnisimmet Company to land of the United States thence running Northwesterly by land of the United States to Island End River, thence running Northwesterly, Northerly, Northeasterly, and Easterly by Island End River, to the dam, thence running Northerly on said dam to a point thereon opposite the middle of said Island End River; thence running Southeasterly across said dam and through the centre of the part of said River sometimes called Dike Pond, to the centre line of Cypress Street extended as shown on said plan and thence running Southeasterly again by a curved line and bounded Easterly in part by land now or formerly of the Chelsea Gas Light Company to the point of beginning; containing about twenty-nine (29) acres more or less together with all my right, title, and interest in and to the flats in said Island End River adjoining the described premises or any part thereof."

No plan has been presented to us on which is plotted this description, nor any plan showing the land of the United States, the Winnisimmet Company or the Chelsea Gas Light Company,

* The defendants were trustees under an indenture of trust, doing business under the name, New England Gas and Coke Company.

with reference to this description. A part of a dike is indicated on one plan, but there is nothing to mark the boundary of the defendants' ownership of any part of it. That deed may or may not include the dike. Whether it does include it or not must be shown by some identifying evidence before it, standing alone, can be evidence sufficient to warrant a finding of title in the defendants.

The plaintiff's evidence tended to show that the repairs on the dike after the break were made by two contractors who were paid by the city of Chelsea. The fact that one John Paul, with certain Italian laborers (who had been seen by one witness working in the yard of the defendants), was observed at some time (but whether before or after the break or with the city contractors does not appear) working upon the dike, does not connect the defendants with it in any responsible capacity.

The evidence of the defendants does not supply this missing link in the plaintiff's case. The dike appears to have been constructed by certain proprietors of marsh lands who, it is asserted, were incorporated for that purpose by St. 1788, c. 74. A deed executed in the name of the "Proprietors of the Marsh on each side of Island River" in 1854, to the United States, in an affidavit annexed contained the affirmation of ownership of the dike by the Proprietors. Such ownership appears to be recognized by St. 1848, c. 167, which is an act ceding to the United States jurisdiction over certain marsh lands in Chelsea, and in which is found this clause: "reserving and excepting, out of the provisions and operation of this act, the following parcel of land, belonging to the proprietors of the marsh on each side of Island River, running into the towns of Malden and Chelsea, and upon which is erected the dam and dyke of said proprietors, namely, a strip of land four rods in width. . . ." There is no evidence in this record that that title has ever changed. Manifestly on such a record there is an utter failure to connect the defendants with the ownership of the dike at the place where the water broke through it. Possibly the plaintiff might have proved title in the defendants; but it cannot be assumed that there was title when none is disclosed by evidence. The point was taken at the trial by the defendants and is pressed here. It cannot be ignored and as the record stands must be upheld.

In rebuttal the plaintiff offered a mortgage of all the defendants' "property including the dike near the pipe line to the Central Trust Co." This evidence had no tendency to explain or repel any offered in defence. It was evidence in chief to support the essential element of the plaintiff's case of showing title or responsible possession of the portion of the dike which gave way in the defendants. Having been offered out of order, whether it should be received or not rested in the judicial discretion of the trial judge.* *Lansky v. West End Street Railway*, 173 Mass. 20, and cases there cited. *Burnside v. Everett*, 186 Mass. 4. *Carroll v. Boston Coal Co.* 195 Mass. 399. Moreover, it does not appear when the mortgage was given. The evidence as to the Matthews deed and the assessors' and the tax collectors' records which was excluded, even if it would have been admissible provided it had been offered seasonably, stands on the same basis.

The other exceptions of the plaintiff become immaterial in view of the decision upon the fundamental issue of the defendants' title. The attempt of the plaintiff to take an appeal was futile. The statement as to an appeal is in the bill of exceptions, which raises all questions of law apparent on the record.

Exceptions overruled.

B. F. Briggs, pro se.

T. Hunt, (F. W. Bacon with him,) for the defendants.

W. RUSSELL MACAUSLAND vs. EDRIC R. TAYLOR & trustee.

Suffolk. November 11, 1914. — February 26, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Trustee Process, Interrogatories to trustee. *Interrogatories. Practice, Civil*, Appeal.

Whether an appeal, taken by one alleged to be a trustee in an action begun by trustee process before final judgment is entered from an order that the trustee be defaulted for failure to obey an order of the court directing him further to answer certain interrogatories of the plaintiff, was taken prematurely, here was

* *Keating, J.*

not decided, it being determined that, even if the appeal properly was before this court, no error of law was disclosed by the record.

Although the answers of one summoned as trustee by trustee process to interrogatories propounded to him by the plaintiff must be accepted as true and cannot be contradicted, and he cannot be subjected through interrogatories to cross-examination, yet the alleged trustee can be required in answer to interrogatories to testify with reasonable minuteness as to the subject under investigation.

In an action of contract begun by trustee process where an order of the court directed the alleged trustee to answer certain of a number of interrogatories filed by the plaintiff under R. L. c. 189, § 11, which the alleged trustee refused to answer and which, respecting a large sum of money disclosed by the trustee, in answer to others of the interrogatories, to have been paid to him as attorney for the defendant, seek information with regard to whom such money was paid to by the alleged trustee, as to whether the trustee rendered an accounting to the defendant and a copy of such accounting if rendered, and as to the amount which the alleged trustee charged the defendant for his services, an appeal by the alleged trustee from the order will not be sustained, although in answer to another interrogatory the alleged trustee has stated that before the service of the writ upon him "the entire balance remaining" in his hands "was paid over in full to the principal defendant" with the exception of a sum equal to one half of the amount claimed by the plaintiff, which was held back to be paid to him; because the plaintiff is not bound to accept such a bald assertion by the trustee, and it does not appear that such interrogatories were in the nature of cross-examination nor intended to elicit answers contradictory to answers already given.

CONTRACT upon an account annexed for \$400.50 for services rendered as a physician. The action was brought by trustee process, Samuel A. Fuller, Esquire, being named as trustee. Writ in the Municipal Court of the City of Boston dated September 21, 1912.

At a trial of the action upon its removal to the Superior Court, the jury found for the plaintiff in the sum of \$436.50 on March 23, 1914. On April 2, 1914, the trustee was allowed to file an answer of "No funds."

The plaintiff thereupon filed interrogatories to the trustee, which, after being ordered by the court to do so, he answered as follows:

Interrogatory 1. What was the amount for which execution issued in the action of Taylor v. Boston & Maine Railroad Company, which is action No. 51586 on the docket of the Superior Civil Court for Suffolk County?

Answer 1. I am unable to state at the present time, but the amount appears in the execution as returned to court satisfied.

Interrogatory 2. Did you receive that sum or any part of it, to the use of the plaintiff in that action?

Answer 2. Yes.

Interrogatory 3. If your answer to interrogatory 2 is in the affirmative, state how much money you so received.

Answer 3. The whole amount of the execution.

Interrogatory 4. If your answer to interrogatory 2 is in the affirmative, state to whom you paid out such money, giving date and amount of each payment.

Answer 4. I decline to answer on the ground that it is immaterial and irrelevant unless directed so to do by the court.

Interrogatory 5. Have you ever rendered an accounting to Edric R. Taylor, the plaintiff in that action?

Answer 5. I have made a final settlement with Edric R. Taylor, the plaintiff in this [that] action, as well as with all other persons whose services were employed in the trial of the case, with the exception of W. R. MacAusland, and I agreed with the said Edric R. Taylor, or somebody representing him, that I would pay one half of the bill rendered by the said W. R. MacAusland, to wit, the sum of \$200.25, and which sum I still retain. Further than that I decline to answer this interrogatory on the ground that it is immaterial unless I am required so to do by the court.

Interrogatory 6. If your answer to interrogatory 5 is in the affirmative, set out in full a copy or copies of such accounting or all such accountings, and state the date or dates on which you rendered it or them.

Answer 6. Excepting in so far as this is answered in the answer to interrogatory 5, I decline to answer on the ground that it is immaterial and irrelevant unless ordered so to do by the court.

Interrogatory 7. If your answer to interrogatory 2 is in the affirmative, state in what bank or banks, or what other places you kept such money, in what name the accounts were kept, and between what periods the accounts were kept.

Answer 7. I decline to answer on the ground that it is immaterial and irrelevant unless ordered so to do by the court.

Interrogatory 8. State whether any other funds were mingled with the Taylor funds in such accounts, and if there were any such other funds so mingled, state what the funds were and of what amount.

Answer 8. I decline to answer on the ground that it is immaterial and irrelevant unless ordered so to do by the court.

Interrogatory 9. What amount did you charge said Edric R. Taylor for your services in connection with the action mentioned in interrogatory 1?

Answer 9. I decline to answer on the ground that it is immaterial and irrelevant unless ordered so to do by the court.

The plaintiff thereupon moved for further answers to interrogatories numbered 1, 4, 5, 6, 7, 8 and 9, and the court so ordered. The trustee appealed from the order directing him further to answer interrogatories 4, 5, 6 and 9, and further answered interrogatory numbered 1 as follows:

"Now comes the trustee in the above entitled action and in answer to interrogatory number 1 says that on July 11, 1912, execution issued in the case of Edric R. Taylor v. Boston & Maine R.R. in favor of the plaintiff for the sum of \$12,500 as debt or damage and \$350 as costs of suit and that on July 12, 1912, the alleged trustee in this case received into his possession the above amounts in satisfaction of said execution, and the alleged trustee further says that long before the bringing of the plaintiff's writ he had, with the consent of the defendant Taylor, or his agent, appropriated his own fees as counsel in said case to his own use from the total amount received in satisfaction of said execution, and the alleged trustee further says that prior to the bringing of the plaintiff's writ he had, with the consent of the principal defendant, Taylor, or his agent, paid out of said amount so received the fees of associate counsel and other necessary expenses incurred in the preparation and trial of said case of Edric R. Taylor v. Boston & Maine R.R.; and the alleged trustee further says that long before the bringing of the plaintiff's writ the entire balance remaining in the hands and possession of the alleged trustee was paid over in full to the principal defendant Taylor, or his agent, with the sole exception of the sum of \$200.25 which was left by defendant Taylor, or his agent, in the hands and possession of the alleged trustee for the purpose of paying to the plaintiff in this action one half of his bill for services rendered in the case of Edric R. Taylor v. Boston & Maine R.R., therefore, the alleged trustee says that at the time of the service of plaintiff's writ on him he had in his hands and pos-

session the sum of \$200.25 which belonged to the principal defendant Taylor, but that other than this he had not at that time any other goods, effects or credits of the principal defendant in his hands or possession."

The plaintiff thereupon moved that the trustee be defaulted for failure to comply with the order of the court as to further answers, and the motion was granted and the trustee was defaulted. The trustee appealed.

On motion of the plaintiff, judgment in the action was ordered entered for him by *Pierce, J.* From this order no appeal was taken.

C. Toye, J. L. Keogh & S. A. Fuller, for the trustee, submitted a brief.

W. Powers, (C. L. Stebbins with him,) for the plaintiff.

RUGG, C. J. If it be assumed in favor of the trustee that his appeal is properly here and is not entered prematurely, no error of law is disclosed. The trustee filed, by leave of court after verdict in favor of the plaintiff against the defendant, an answer that he had no funds. Then the plaintiff filed nine interrogatories to the trustee, to which no answers were returned until a special order of the court had been made. Then the trustee answered two of the interrogatories in full, answered three others, incompletely as the plaintiff contended, and refused to answer the remaining four. Thereupon, the court ordered further answers to be made and the trustee complied with the order in part, but still refused to answer four interrogatories and appealed from an order of the court directing him to make answer. For such refusal the trustee was defaulted, and from this he appealed. The court had the power to order the default entered, provided the interrogatories were proper and required an answer from the trustee as matter of law.

It appeared from the answers filed that the trustee collected a judgment in favor of the principal defendant amounting to \$12,850, of which \$200.25 remained in his hands, and that he had paid out the entire balance for attorneys' fees and other expenses and to the principal defendant. The interrogatories which were not answered were designed to elicit a detailed statement of what the trustee had done with the amount collected on the execution, and where it had been deposited pending the set-

tlement. The plaintiff, having traced a large sum of money into the hands of the trustee, had a right to inquire as to the state of the account in some detail. He was not obliged to accept as final the bald assertion of the trustee that he had settled with the principal defendant and had paid out all that was due him. *Nutter v. Framingham & Lowell Railroad*, 131 Mass. 231. The plaintiff justly might ask to know more explicitly the facts upon which that conclusion rested. *Brennan v. McInnis*, 173 Mass. 471, 474. All the interrogatories were directed to that end. They were not in the nature of cross-examination, nor calculated to contradict any answers given. The answers of the trustee must be accepted and cannot be contradicted, and he cannot be subjected to cross-examination. But, on the other hand, he can be required to testify in answer to interrogatories, as can a witness called upon the stand, with reasonable minuteness as to the subject under investigation. It is doubtful whether an answer could have been required as to some details specified in interrogatory 8 touching other funds with which the receipts collected from the execution might have been commingled. But doubtless a part of it was proper. In view of the general peremptory refusal to answer this interrogatory as well as others, there is no error.

Default of trustee to stand.

WILLIAM A. DAVIDSON *vs.* EMILY L. SOHIER & another.

Suffolk. November 11, 12, 1914. — February 26, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Equitable Restrictions.

If the language of a deed of land specifically states "that the house first erected on" the land shall be subject to a certain restriction, and, "This agreement and restriction to apply solely to the house first erected on said premises and not to any house subsequently erected thereon," the restriction in no way applies to any building or structure erected upon the land after the first house is built thereon, although such first house remains standing, there being no implied restriction that only one house or building shall stand on the land at the same time.

PETITION, filed in the Land Court on January 3, 1912, for the registration of land at the corner of St. Mary's Street and Beacon Street in Boston.

The respondents Emily L. and Mary D. Sohier objected to any decree permitting the erection of a building more than four feet deeper than the rear wall of their house, relying on the following restriction, contained in the deed of the trustees under the will of John W. Shapleigh to the petitioner's predecessor in title:

"That the house first erected on said parcel of land at the northeast corner of said Beacon Street and Saint Mary's Street shall not be more than four feet deeper from said Beacon Street than the rear wall of the house conveyed by said John W. Shapleigh to Mary D. Sohier and others by deed dated January 15, 1890, and recorded with Suffolk Deeds in Book 1917, Page 279, as said rear wall existed on said last mentioned date. This agreement and restriction to apply solely to the house first erected on said premises and not to any house subsequently erected thereon."

The case was heard by *Clark, J.* The material facts are stated in the opinion. The judge ruled "that upon the erection and finishing of the first house on the petitioner's lot said restriction was completely satisfied and fulfilled and is no longer in force," and ordered a decree accordingly. The respondents alleged exceptions, which, after the death of *Clark, J.*, were allowed by *Corbett, J.*

B. E. Eames, for the respondents.

H. H. Ham, (*L. J. Dunn* with him,) for the petitioner.

Rugg, C. J. One Shapleigh in 1890 owned seven contiguous lots on the northerly side of Beacon Street. The one on the corner of St. Mary's Street was vacant. A block of four houses stood on the four lots next to the corner, which Shapleigh had erected, all having a similar depth from Beacon Street. In that year he sold the house and lot next but one to the corner to the respondents, delivering at the same time with the deed a letter signed by himself, in which he said:

"As one of the considerations of your purchase from me of the house on the northerly side of Beacon Street near Saint Mary's Street, I agree with you that the house first erected on my parcel

of land at the northeast corner of said Beacon Street and Saint Mary's Street shall not be more than four feet deeper from said Beacon Street, than the present rear wall of the house so purchased by you of me; and I further agree with you that if I should sell said parcel of land before I had so built thereon, that I will incorporate in my deed thereof a restriction substantially similar in form to the above agreement. This agreement and restriction to apply solely to the house first erected on my said premises and not to any house subsequently erected thereon."

The petitioner has become the owner of the corner lot through several mesne conveyances. The deed from Shapleigh, under which he holds title, contained a restriction in substance the same as that set out in the letter of 1890 to the respondents just quoted. In 1911 the petitioner built a house on his lot which conformed to the terms of the deed. He now proposes, without tearing down that house, to erect another building on the lot which will partly cover that portion of the lot more than four feet deeper from Beacon Street than the rear wall of the respondents' house. The question is whether the respondents can prevent him from executing this purpose.

If it be assumed in favor of the respondents (but without so deciding) that they have a right to enforce the restriction in the petitioner's deed, that restriction, rightly construed, does not prohibit the erection of the proposed building. The words used in the instrument creating the restriction must define in terms its scope. While they must be read in the light of the subject matter to which they refer and must be interpreted in a way, consistent with their true meaning, to effectuate what may be presumed to have been the reasonable purpose of the parties, yet they cannot be stretched beyond their fair import to accomplish what it may be thought the parties would have desired had the situation, which now has developed, been foreseen by them at the time when the restriction was written. *Boston Baptist Social Union v. Boston University*, 183 Mass. 202.

The words of the Shapleigh letter and deed are restricted by definite and unequivocal phrase to "the house first erected" on the petitioner's lot. Any subsequent building is excluded expressly from its operation. There is no word to indicate a purpose that only one house or building shall be built on the lot at

the same time. That would have been a thought easy to state in a simple way if it had been in the minds of the parties. It may have been that this was intended to be left to the selfish interest, æsthetic taste or neighborly instincts of the owner of the corner lot. This suggestion gains some support from the fact that for more than twenty years since the purchase by the respondents there has been no occasion for complaint, for the corner lot has been unoccupied. But whatever may have been the cause of the use of the words employed, their plain meaning does not permit an enlargement of their force and effect so as to include any second building to be erected on the lot, whether while the first is standing or after it is destroyed. When the words are made to apply so pointedly to the first house alone, it would not be interpretation of a written instrument, but rather speculation as to an undisclosed design, to extend the restriction to a second building even though it be in addition to and not in substitution for the first house. *Hubbell v. Warren*, 8 Allen, 173. *Smith v. Bradley*, 154 Mass. 227. *Peck v. Hartshorn*, 189 Mass. 110. *Noyes v. Cushing*, 209 Mass. 123.

Exceptions overruled.

CHARLES E. COTTING & others, trustees, vs. HOOPER, LEWIS AND COMPANY, INCORPORATED, & another.

Suffolk. November 18, 1914. — February 26, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Assignment, For benefit of creditors. Bankruptcy.

Under the provisions of an assignment for the benefit of creditors, that the net proceeds of the estate of the assignor shall be distributed in substantial conformity with the "bankruptcy acts of the United States," and that the obligations and liabilities of the assignee are limited to such debts, obligations and liabilities as are provable "against the estates of bankrupts under said bankruptcy acts, and are not entitled to priority under said acts," the assignee need not recognize as a creditor entitled to the benefits of the assignment one, the existence of whose debt, whether liquidated or unliquidated, is contingent at the time of the delivery of the assignment.

Accordingly where, at the time of the delivery of the assignment above described, the assignor was occupying certain land under a lease which provided that, upon the making of such an assignment the lessor might "immediately, or at any time thereafter" enter upon and repossess the demised premises, and that, upon his electing so to do, he should be entitled to indemnity for the rest of the term for loss of rents and other payments due under the lease, or, at his election, to damages in such sum as would measure the difference between the rental value of the premises and the rent reserved with other payments, the lessor, under the above quoted provisions of the lease, is not a creditor entitled to benefit under the assignment, because, at the time of the delivery of the assignment, he had not and could not have made an election as to which of the privileges given him by the lease he should follow, and therefore his debt was contingent.

BILL IN EQUITY, filed in the Superior Court on March 31, 1914, and afterwards amended, against the corporation Hooper, Lewis and Company, Inc., and Albert F. Rebhan, its assignee for the benefit of its creditors, seeking to compel the defendant Rebhan to recognize the plaintiffs as creditors of the defendant corporation under the provisions of a lease of a building to be occupied as a store by the defendant, and as entitled to the benefits of the assignment, as stated in the opinion.

The defendants severally demurred to the bill. The demurrers were sustained by *Wait, J.*, and a final decree was entered dismissing the bill. The plaintiffs appealed.

B. E. Eames, (*A. L. Jackson* with him,) for the plaintiffs.

F. L. Norton, for the defendants.

BRALEY, J. By the assignment of the defendant corporation for the benefit of creditors the lessors had the right to enter upon the premises and terminate the lease. And under the lessee's covenants that, upon termination, the lessors for the remainder of the term should be entitled to indemnity against loss of rents and other payments, or at their election to demand the payment of damages in such sum as would measure the difference between the rental value of the premises and the rent reserved with other payments, they assented to the assignment as required by its terms and asserted that as creditors they should be permitted to share in the distribution of the net assets. The defendant assignee having refused to recognize the claim, they ask by the bill as amended that the damages may be ascertained and allowed against the estate.

If the assignment contained no provisions as to the nature and

character of the liabilities of the assignor, upon which dividends were payable, the question whether the plaintiffs can participate would have to be determined as at common law. *Andrews v. Tuttle-Smith Co.* 191 Mass. 461. *Smith v. Goodman*, 149 Ill. 75. But as the instrument expressly provides that the net proceeds shall be distributed in substantial conformity with the "bankruptcy acts of the United States" and the obligations and liabilities of the assignor are limited to such debts, obligations and liabilities as are provable "against the estates of bankrupts under said bankruptcy acts, and are not entitled to priority under said acts," § 63 of the U. S. St. of 1898, c. 541, is by reference incorporated and must be followed by the trustee. *Lipsky v. Heller*, 199 Mass. 310, 315. *Andrews v. Tuttle-Smith Co.* 191 Mass. 461.

The material portions are as follows: "a Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not . . . ; (4) founded upon an open account, or upon a contract express or implied; . . . b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." It was said in *Dunbar v. Dunbar*, 190 U. S. 340, that the purpose of § 63 b was to permit an unliquidated claim coming within the terms of § 63 a to be liquidated as the court might direct; and in *Zavelo v. Reeves*, 227 U. S. 625, that the debts or claims provable under the several classes of liabilities of § 63 are debts or claims which existed at and before the filing of the petition. It follows that omissions cannot be supplied by construction based on the U. S. St. of 1867, c. 176, § 19, providing for the proof of contingent liabilities, and the liability of the bankrupt is to be ascertained solely as of the date of filing the petition. If the existence of the debt or claim, whether liquidated or unliquidated, is then contingent, it is not provable. *Morgan v. Wordell*, 178 Mass. 350. *Goding v. Rosenthal*, 180 Mass. 43. *Dunbar v. Dunbar*, 180 Mass. 170. *Harmon v. McDonald*, 187 Mass. 578. *Smith v. McQuillen*, 193 Mass. 289. *Wetmore v. Markoe*, 196 U. S. 68. The distinction between demands, whose existence

depends on a contingency, and existing demands, the cause of action upon which is dependent upon a contingency, is clearly pointed out in *French v. Morse*, 2 Gray, 111.

The lease did not provide that upon making the assignment the leasehold should cease and determine and the lessee thereupon should become indebted for the rent payable for the unexpired term, or that rent or damages to be ascertained, as the instrument provides, should at once accrue and be payable. If either of these provisions had appeared the lessors might have contended that under § 63 a, cl. 1, 4, the liability would have been absolutely fixed concurrently with the date of the assignment, and a different question would be presented. *In re Keith-Gara Co.* 203 Fed. Rep. 585, 587. *Ludlow v. Pugh*, 213 Fed. Rep. 450. The right of termination under either covenant was optional with the lessors, "who may, immediately, or at any time thereafter" enter upon and repossess the demised premises. The right might or might not be exercised. If not exercised, the lessee remained bound by the covenant for rent. If exercised, then the lessors at their election upon repossession could rely on either the covenant for indemnity or the covenant for damages, but the rent ceased. The period of decision could not begin until the assignment had become operative and there could be no termination until an actual entry. It is admitted that the plaintiffs promptly entered, yet the right to either indemnity or damages did not accrue until entry, when the leasehold estate was divested and terminated. *Fifty Associates v. Howland*, 11 Met. 99, 102. The lessors could not have both indemnity and damages, and of course further affirmative action must be taken by making an election, which they did by bringing the present suit. It would seem to be manifest that at the date of the assignment the claim for damages was a contingent and not an existing demand, presently due, but not presently payable, even if resting upon a contract and capable of liquidation. *Savory v. Stocking*, 4 Cush. 607. *Deane v. Caldwell*, 127 Mass. 242. *Bowditch v. Raymond*, 146 Mass. 109, 114, 115. *McDermott v. Hall*, 177 Mass. 224, 225. *McIntire v. Cottrell*, 185 Mass. 178, 180. *Hall v. Middleby*, 197 Mass. 485. *Atkins v. Wilcox*, 105 Fed. Rep. 595. *Weeks v. International Trust Co.* 125 Fed. Rep. 370. And being a future demand, contingent upon uncertain events, it would not be provable. *In re Ells*, 98 Fed. Rep. 967.

Watson v. Merrill, 136 Fed. Rep. 359. *In re Roth & Appel*, 181 Fed. Rep. 667; 104 C. C. A. 649; 31 L. R. A. (N. S.) 270, note. *Slocum v. Soliday*, 183 Fed. Rep. 410. *Coleman Co. v. Withoft*, 195 Fed. Rep. 250. *In re Sherwoods, Inc.* 210 Fed. Rep. 754. *In re Jorolemon-Oliver Co.* and *In re United Shoe Machinery Co.* 213 Fed. Rep. 625. *Zavelo v. Reeves*, 227 U. S. 625. *Shapiro v. Thompson*, 160 Ala. 363. *Phenix National Bank v. Waterbury*, 123 App. Div. (N. Y.) 453, 457, 458.

While our conclusion is in accord with the great weight of authority, the plaintiffs place much reliance upon *In re Philip Semmer Glass Co.* 135 Fed. Rep. 77, 78, and *In re Smith*, 146 Fed. Rep. 923, which, following *Moch v. Market Street National Bank*, 107 Fed. Rep. 897, admitted to proof commercial paper indorsed by the bankrupt, although not due at the date of filing the petition, but maturing within the year limiting proof of claims under § 57 n; and upon *In re Caloris Manuf. Co.* 179 Fed. Rep. 722, where the lease provided that upon default in payment of rent the landlord could re-enter, terminate the lease and relet the premises, and the lessee should be liable for the difference between the rent reserved and the rent received for the remainder of the term. The tenant went into bankruptcy. The landlord re-entered and relet. The court, citing *Moch v. Market Street National Bank* and *In re Smith*, held that, the difference between the amounts having been liquidated within the year, it was provable.

The decision in *Moch v. Market Street National Bank* and the cases which follow it go, however, upon the ground that § 63 a, cl. 4, allowing proof of claims founded upon "a contract, express or implied," is distinct from § 63 a, cl. 1, requiring "a fixed liability" at the time of filing the petition. But this construction of the statute was not adopted in *Zavelo v. Reeves*, 227 U. S. 625, decided since the preceding cases, where the court say expressly that, "reading the whole of § 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under § 63 a 4 include only such as existed at the time of the filing of the petition in bankruptcy." If the decision in *In re D. C. Clark Shoe Co.* 211 Fed. Rep. 341 tends in principle to support the plaintiffs' contention, *Slocum v. Soliday*, 183 Fed. Rep. 410, previously decided in the same cir-

cuit, as well as the other cases in bankruptcy which we have cited where a similar question was adjudicated, are not referred to in the opinion.

It is unnecessary to consider the question of misjoinder, as for the reasons stated the decree sustaining the demurrer and dismissing the bill must be affirmed, with costs.

Ordered accordingly.

THOMAS W. GREENALL vs. ERNEST L. HERSUM & another.

Suffolk. November 19, 1914. — February 26, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Conversion. Bankruptcy, Disclaimer by trustee.

Where, at the trial of an action for the conversion of household goods, it appears that the plaintiff placed the goods with the defendant to be stored and when he did so stated to the defendant that he "had some domestic trouble with his wife" and instructed him "not to deliver the goods to any one but the plaintiff and particularly not to the plaintiff's wife," and that thereafter the defendant without the consent of the plaintiff delivered the goods to the plaintiff's wife, no proof by the plaintiff of a demand by him for the goods and of a refusal by the defendant to deliver them to him before the bringing of the action is necessary, and a verdict for the plaintiff is warranted.

If, at the trial of an action for the conversion of certain goods, it appears that before the conversion the plaintiff was adjudicated a bankrupt and a trustee in bankruptcy was appointed, and the evidence is closed without any evidence being introduced to show the position of the trustee in bankruptcy with regard to the action, and if thereupon the trial judge sends for the trustee in bankruptcy, who, after a consideration of the circumstances, files a disclaimer of all right, title and interest in and to the goods or their value, all objection to the plaintiff's right to maintain the action on account of the bankruptcy proceedings is removed.

TORT for the conversion of certain household goods and wearing apparel. Writ dated June 25, 1913.

In the Superior Court the case was tried before *Lawton, J.*

There was evidence tending to show that on December 13, 1911, the plaintiff placed the goods in storage with the defendants, stating to them at the time that he "had some domestic

trouble with his wife," and instructing them "not to deliver the goods to any one but the plaintiff and particularly not to the plaintiff's wife."

It appeared that on November 5, 1912, the plaintiff was adjudicated a bankrupt, that on January 14, 1913, Lloyd Makepeace, Esquire, was appointed trustee in bankruptcy, and that on January 31, 1913, the defendants delivered the goods in storage to the plaintiff's wife.

In April, 1913, the plaintiff's wife obtained a divorce from him, and later she married again. She testified that the goods in question were her property.

At the close of the evidence the trial judge sent for the trustee in bankruptcy of the plaintiff's estate in order to ascertain what, if anything, the trustee wished to do in connection with the action. The trustee, after having been informed by counsel for the parties of the nature of the action and of the testimony, declined to become a party to the action and informed the trial judge that he might disclaim any interest in the goods or the right of action thereon. After consulting with the referee in bankruptcy, the trial having been suspended for that purpose, the trustee filed an instrument, disclaiming "any right, title or interest in or to the goods and chattels sued for in the . . . action or the value thereof."

The defendants asked for the following rulings:

"1. On all the evidence the plaintiff is not entitled to recover.

"2. On all the evidence the jury should be instructed to return a verdict for the defendants.

"3. Upon filing a petition in bankruptcy and an adjudication thereon, title and right to the possession of all the property then owned by the plaintiff vested in his trustee in bankruptcy except such property as is claimed by the plaintiff in his petition as exempt by law, and, as to such last named property, right of possession vested in such trustee and the plaintiff is not entitled to possession of such property unless and until it has been determined and set apart for the plaintiff by the trustee.

"4. The burden of proof is on the plaintiff to show such determination and setting apart to him by the trustee.

"5. The plaintiff cannot maintain this action without proof

of a demand by him on the defendants for the property alleged to have been converted and a refusal by them to deliver such property to him."

The rulings were refused. The jury returned a verdict for the plaintiff in the sum of \$829.80; and the defendants alleged exceptions.

J. H. Morson, for the defendants.

C. F. Eldredge, for the plaintiff.

BRALEY, J. The jury would have been warranted in finding upon conflicting testimony that the defendants as bailees upon demand by the plaintiff failed to deliver the goods which they had received for storage because of a previous delivery to his wife, and as they further could find that she acted without his authority there was a conversion which ordinarily would entitle him to recover damages, and the fifth ruling requested could not have been given. *Lorain Steel Co. v. Norfolk & Bristol Street Railway*, 187 Mass. 500, 506. *Wright & Colton Wire Cloth Co. v. Warren*, 177 Mass. 283.

But, the plaintiff having been adjudged a bankrupt after the bailment, and no reconveyance having been made by the trustee before the action was begun, the defendants contend that the plaintiff failed to show any right to immediate possession, and that the first, second, third and fourth requests should have been given. *Raymond Syndicate v. Guttentag*, 177 Mass. 562. *Hodgkins v. Bowser*, 195 Mass. 141. U. S. St. of 1898, c. 541, § 70. It is, however, settled that the trustee is not obliged to accept title to property if in his opinion it is worthless, and he well might have concluded that any assertion of ownership meant a lawsuit, the outcome of which was so uncertain that the estate ought not to be put to the expense of fruitless litigation. *Dushane v. Beall*, 161 U. S. 513, 515. If he had expressly renounced title or declined to claim the goods before the action, the election would have been sufficient to show that the plaintiff was entitled to possession. *Mayhew v. Pentecost*, 129 Mass. 332. But, as the trustee's assent may be shown as well after as before suit, his disclaimer, filed and allowed during the trial and before the verdict, removed the objection. *Herring v. Downing*, 146 Mass. 10.

It moreover is plain that the judgment will bar further suits

for the same cause of action. *Stone v. Jenkins*, 176 Mass. 544, 545, 546.

We are accordingly of opinion that these rulings were rightly refused and the exceptions should be overruled.

So ordered.

MERCHANTS LEGAL STAMP COMPANY *vs.* WILLIAM H. MURPHY
& another.

Suffolk. November 30, 1914. — February 26, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Trading Stamps. Contract, Validity. Monopoly. Restraint of Trade. Equity Jurisdiction, No enforcement of unlawful contract. Words, "Article."

Trading stamps and trading stamp books, into which the stamps are to be pasted for the purpose of presenting the books for redemption by the corporation that issues them, are "articles" within the meaning of St. 1908, c. 454, § 1, which prohibits "a monopoly in the manufacture, production or sale in this Commonwealth of any article or commodity in common use."

Where trading stamps and trading stamp books, into which the stamps are to be pasted for the purpose of presenting the books for redemption by the corporation that issues them, are sold to the merchants of a city and its vicinity, for use among their customers in inducing cash sales by providing a discount or return on every purchase made, under a contract by which the merchants agree not to use trading stamps issued by any other corporation or individual and not to sell the books or stamps to any one, and where by the operation of this system the corporation issuing the trading stamps and books controls nearly ninety per cent of the actual business conducted in this form by the merchants of the city and its vicinity, a monopoly is sought to be established, in a form of bargain and sale which a very appreciable portion of the public demands, that is declared by St. 1908, c. 454, § 1, to be "against public policy, illegal and void," so that a court of equity will refuse to enforce the restriction contained in the contracts by enjoining others from carrying on a similar enterprise in a lawful manner.

BILL IN EQUITY, filed in the Superior Court on December 26, 1913, by a corporation organized under the laws of this Commonwealth on March 15, 1904, for the purpose, among other things, of conducting a trading stamp business of the character described in the opinion, against another trading stamp corporation and William H. Murphy, who was one of the incorporators of the plaintiff and had been one of its directors, a member

of its executive committee and its general manager, and afterwards had severed his connection with the plaintiff and had formed the defendant corporation, of which the defendant Murphy was a director and its president and general manager. The bill alleged that the defendant Murphy and the defendant corporation had been engaged actively in soliciting customers of the plaintiff to enter into contracts with the defendant corporation for the use of its trading stamps and books, and had induced former customers of the plaintiff to break their contracts with the plaintiff and to execute contracts with the defendant corporation for the use of trading stamps. There were prayers for an injunction and for damages.

The defendants in their answers set up, among other matters, that the plaintiff was attempting to create an unlawful monopoly in the trading stamp business in Boston to the exclusion of the defendant and other corporations and firms engaged in the business of selling trading stamps.

The case was referred to Franklin T. Hammond, Esquire, as master. He filed a report in which, among other facts, he found those that are stated in the opinion. The defendants filed certain exceptions to the master's report, which have become immaterial because they were not argued before this court. An interlocutory decree was made by *Jenney, J.*, overruling the exceptions to the master's report and confirming that report. Later by order of *Wait, J.*, a final decree was entered ordering that the report of the master be confirmed and that the bill be dismissed without costs. The plaintiff appealed from the final decree, having appealed previously from the interlocutory decree.

St. 1908, c. 454, § 1, is as follows: "Every contract, agreement, arrangement or combination in violation of the common law in that thereby a monopoly in the manufacture, production or sale in this Commonwealth of any article or commodity in common use is or may be created, established or maintained, or in that thereby competition in this State in the supply or price of any such article or commodity is or may be restrained or prevented, or in that thereby, for the purpose of creating, establishing or maintaining a monopoly within this State of the manufacture, production or sale of any such article or commodity, the free pursuit in this State of any lawful business, trade or occupation is or may

be restrained or prevented, is hereby declared to be against public policy, illegal and void."

S. L. Whipple & H. W. Ogden, for the plaintiff.

W. B. Grant, for the defendant Murphy.

J. R. Lazenby, for the Peoples Cash Stamp Company.

BRALEY, J. The principal if not the sole business of the plaintiff is the issuing of trading stamps at a fixed price to merchants who give them to their customers for cash purchases usually on the basis of one stamp for every ten cents of the price of the article bought, and after a number of stamps thus have been collected the merchant or collector presents them to the plaintiff for redemption at a fixed rate. By this arrangement the stamp or coupon operates as a discount in cash for every purchase made. *Commonwealth v. Sisson*, 178 Mass. 578. The books containing the contract are described by the master as ruled off into spaces similar to stamp albums into which the collectors, who are also the purchasers, paste the stamps, and the plaintiff redeems them at a lower price; the difference measures the company's profits. It is plain that the plaintiff is a trading stamp company giving premiums or a valuable consideration for stamps furnished to purchasers of goods as an inducement for payment in cash. The master's report shows that under the operation of this system the plaintiff controls nearly ninety per cent of the actual business conducted in this form by the merchants of Boston and its vicinity. By the provisions of the contract designed for this territory the company retains title to the book and stamps with an agreement by the authorized merchant or customer not to part with them except in the specified course of trade, and to return the book with the stamps attached which may have been presented to him by purchasers. If this is not done, all rights under the contract cease or are forfeited. We said in *O'Keeffe v. Somerville*, 190 Mass. 110, that trading stamps, not being a commodity within the meaning of our Constitution, were not subject to an excise tax, although no attempt was made to classify them. Nor is it necessary now to determine whether the contract is strictly a bailment. *Hunt v. Wyman*, 100 Mass. 198. *Springfield Engine Stop Co. v. Sharp*, 184 Mass. 266. *Isaacs v. Macdonald*, 214 Mass. 487. Or whether the stamps are choses in action. *Sperry & Hutchinson Co. v. Hertzberg*, 3 Rob. (N. J.) 264. The transaction

is to be determined from its inherent character or purpose. If not goods, wares or merchandise as those terms ordinarily are used, or the title did not vest in the purchaser, but he had only a limited use, they do represent and were intended to represent a mode of doing business which under modern mercantile conditions is in itself a business potentially affecting and largely controlling certain well recognized lines of trade. The books and stamps when viewed in the light of their manufacture and use by the plaintiff, coupled with its contract treating them not as symbols but as chattels of value which are the subject of sale or of bailment, are to be deemed "articles" within the meaning of St. of 1908, c. 454, § 1. It is expressly found that the plaintiff declines to supply stamps to merchants unless they stipulate not to use trading stamps issued by other companies or individuals, and that the insertion of this provision in the contract is to suppress all competition. The direct tendency of the plaintiff's system of business under all the findings results in such concentration as to substantially control prices for a form of service or of supposed profits to purchasers demanded by the public. *Commonwealth v. Strauss*, 188 Mass. 229, 231. The scheme the plaintiff has so carefully elaborated and built up is in reality a device whose predominant purpose, as shown by its practical and successful operation, tends to drive all competitors from the field. *New York Bank Note Co. v. Kidder Press Manuf. Co.* 192 Mass. 391, 403. *United Shoe Machinery Co. v. La Chapelle*, 212 Mass. 467, 480. The monopoly it seeks to establish may not be complete, but it has gone far enough to eliminate any effective rivalry. The restriction is not confined to the sale or transfer to a business rival of the plaintiff, but the merchant or collector cannot dispose of the book or stamps to any one, even if their retention unused must result in pecuniary loss. Indeed this is an essential and controlling feature of the contract, which differs materially from the contract in *Gagnon v. Sperry & Hutchinson Co.* 206 Mass. 547. While we do not go so far as to say that trading stamps are an absolute public necessity, yet they enter into the merchant's business, and are an essential element of a form of bargain and sale which a very appreciable portion of the public demands. *Beechley v. Mulville*, 102 Iowa, 602.

The direct and intended effect of the methods employed being

to restrain or prevent the pursuit, by the defendants or of others of a similar enterprise in a lawful manner, the plaintiff is within the prohibition of the St. of 1908, c. 454, § 1, which declares that such an arrangement or agreement, whatever form it may assume, or however carefully the constituent parts may be assembled, is "against public policy, illegal and void."

The exceptions to the report, not having been argued, need not be considered, and the master having found that the defendants have not as to the plaintiff's customers used or proposed to use any information obtained from it while the defendant Murphy was in its employ, the defendants are not shown to have violated any enforceable rights of the plaintiff. St. 1908, c. 454, § 2. *White v. Buss*, 3 Cush. 448. *Gibney v. Olivette*, 196 Mass. 294, 295. *Kennedy v. Welch*, 196 Mass. 592.

The decree dismissing the bill therefore is affirmed with costs.

Ordered accordingly.

CHARLES E. KOONTZ vs. BALTIMORE AND OHIO RAILROAD
COMPANY & trustee.

Suffolk. January 11, 1915. — February 26, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Jurisdiction. Corporation, Foreign. Trustee Process. Attachment, Of rolling stock. Railroad.

In an action against a foreign railroad corporation begun by trustee process, if there has been no personal service on the defendant and no direct attachment of property of the defendant, a valid judgment can be entered only against the property attached by trustee process, and, if the alleged trustee is not chargeable, the case must be dismissed.

In determining the question whether an alleged trustee in an action begun by trustee process is chargeable under R. L. c. 189, §§ 9-17, where no interrogatories to the trustee have been filed the answer of the alleged trustee must be taken as true.

In an action against a foreign railroad corporation, which was an interstate carrier, freight cars that were the property of the defendant were attempted to be

attached by trustee process in the possession of a Massachusetts railroad corporation, which also was an interstate carrier and which had received and retained the cars and at the time of the alleged attachment actually was making use of them under an arrangement with the defendant that gave the alleged trustee the right to despatch them to the place of destination on its own lines and the right to use the empty cars for carrying freight between different points on its own road and on the lines of other railroad companies directly or indirectly connected with the railroad of the defendant upon the payment of fixed daily charges so long as any of the cars remained on tracks that the alleged trustee owned or controlled. *Held*, that the Massachusetts corporation was not chargeable as trustee as to the cars of the defendant thus in its possession, and that it was unnecessary to determine whether the attachment was invalid by reason of a failure of the plaintiff to comply with the provisions of R. L. c. 167, § 39, relating to the attachment of railroad cars in use in making regular passages.

TORT by an employee of the Baltimore and Ohio Railroad Company, a corporation organized under the laws of the State of Maryland and alleged to have a usual place of business in Boston, against such employer for personal injuries sustained by the plaintiff in Maryland or in the State of Pennsylvania, of which he was an inhabitant. Writ dated September 16, 1913.

The action was begun by trustee process. Service was attempted to be made on the defendant by serving on the commissioner of corporations of Massachusetts and by summoning as trustee the New York, New Haven, and Hartford Railroad Company, a corporation organized under the laws of the Commonwealth of Massachusetts and having a usual place of business in Boston.

The portion of the officer's return on the writ material to the case was as follows: ". . . and on the same day I attached a chip as the property of the within named defendant corporation, The Baltimore & Ohio Railroad Company, and subsequently on the same day I summoned said defendant to appear and answer at court as within directed, by leaving at the office of the commissioner of corporations in and for this commonwealth, as the true and lawful attorney, upon whom service of process for said corporation may be made, an attested copy of this writ and the statute fee of two dollars."

The defendant appeared specially and filed a motion to dismiss the action and a plea in abatement on the grounds of insufficient service upon the defendant, because there was no effectual attachment of the defendant's property, and because it did not

appear from the face of the proceedings that the defendant was in any way subject to the jurisdiction of the court.

The answer of the alleged trustee admitted that at the date of service the trustee, which was an interstate carrier, had in its possession one hundred and twenty-seven freight cars that were the property of the defendant, which also was engaged in interstate commerce, and alleged that other than this the alleged trustee did not have in its possession any goods, effects or credits of the defendant. The terms and conditions under which the cars of the defendant were in the possession of the alleged trustee at the time of the service of the writ are stated in the opinion.

In the Superior Court the case came on to be heard before *Pierce, J.*, upon the defendant's motion to dismiss the action and the trustee's motion to be discharged, the defendant having waived its answer in abatement. At the hearing on these motions neither party offered evidence of any facts other than those that were stated in the pleadings or in the alleged trustee's answer. The judge ruled that the defendant's motion to dismiss the action should be allowed, and that the trustee's motion to be discharged should be denied. Being of opinion that these orders ought to be determined by this court before any further proceedings in the Superior Court, the judge at the request of the parties reported the case for such determination.

C. Towe, for the plaintiff, submitted a brief.

F. Foster, for the Baltimore and Ohio Railroad Company.

J. L. Hall, for the New York, New Haven, and Hartford Railroad Company.

BRALEY, J. The amended return on the writ having been insufficient to show any personal service on the defendant, a foreign corporation, described in the writ as having a usual place of business at Boston in this Commonwealth, the court could not enter judgment against the company, which has appeared specially for the purpose of pleading in abatement or to move that the action be dismissed. St. 1903, c. 437, § 62. R. L. c. 170, § 1. *Eliot v. McCormick*, 144 Mass. 10. *Needham v. Thayer*, 147 Mass. 536. *Kimball v. Sweet*, 168 Mass. 105. *Roberts v. Anheuser Busch Brewing Association*, 215 Mass. 341, 343. *Lawrence v. Bassett*, 8 Allen, 140. *Crosby v. Harrison*, 116 Mass. 114. But, as the action

was begun by trustee process, the court, if the trustee is charged, can enter a valid judgment against the property attached. *Sprague v. Auffmordt*, 183 Mass. 7. *Lowrie v. Castle*, 198 Mass. 82. R. L. c. 170, §§ 1, 6.

The question whether the alleged trustee should be charged depends upon its answer, which is to be taken as true, as no interrogatories have been filed. R. L. c. 18C, §§ 9-17. *Fay v. Sears*, 111 Mass. 154. *Corsiglia v. Burnham*, 189 Mass. 347.

To maintain an effectual attachment there must be at the date of service a subsisting cause of action which the debtor can enforce against the trustee in his own name, or the debtor must have entrusted to or deposited with the trustee specific goods or effects. *Wart v. Mann*, 124 Mass. 586. *Casey v. Davis*, 100 Mass. 124. *Howland v. Wilson*, 9 Pick. 18.

It is expressly stated in the answer, that at the date of service the trustee, an interstate railroad company, had in its possession a large number of freight cars that were the property of the defendant, also engaged in interstate commerce. The cars, if subject to garnishment, were undoubtedly goods or chattels within the meaning of R. L. c. 189, §§ 12, 13, 19. *Brown v. Floersheim Mercantile Co.* 206 Mass. 373. *Rosenbush v. Bernheimer*, 211 Mass. 146. See also Sts. 1905, c. 324; 1910, c. 214, §§ 23, 24; c. 559, § 3. If received here and to be returned in the ordinary course of business, we should hesitate to say that under no circumstances cars of a foreign railroad company would not be subject to attachment under our laws because the attachment temporarily might interfere with interstate commerce or with the provisions of U. S. Rev. Sts. § 5258, securing continuity of interstate transportation. *Davis v. Cleveland, Cincinnati, Chicago & St. Louis Railway*, 217 U. S. 157. *Simpson v. Shepard*, 230 U. S. 352, 410. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 588. *DeRochemont v. New York Central & Hudson River Railroad*, 75 N. H. 158. *Southern Flour & Grain Co. v. Northern Pacific Railway*, 127 Ga. 626. Compare *Connery v. Quincy, Omaha & Kansas City Railroad*, 92 Minn. 20, *Wall v. Norfolk & Western Railway*, 52 W. Va. 485, and *Seibels v. Northern Central Railway*, 80 S. C. 133. Doubtless the compulsory enforcement of a legal right by due process of law may result in

a temporary interference with the carrier's business, but this was held in *Martin v. West*, 222 U. S. 191, 197, not to offend against the commerce clause of the Constitution.

The trustee, however, received and retained the cars under an arrangement or agreement with the defendant which gave it the right to despatch them to the place of destination on its own lines, instead of transferring the freight to its own cars for further and final transportation. It also could use the empty cars for the carrying of freight between different points on its own road, and on the lines of other railroad companies directly or indirectly connected with the railroad of the owner of the cars, upon payment of fixed daily charges, so long as any car remained on tracks that the trustee owned or controlled. The cars thus became for the time being part of its equipment, and compensation therefor ceased only when they passed out of the trustee's possession and control. *Foster v. New York, New Haven, & Hartford Railroad*, 187 Mass. 21. *McNamara v. Boston & Maine Railroad*, 202 Mass. 491. If the trustee is chargeable, it must retain actual possession so that the cars can be seized on execution. *Brown v. Floersheim Mercantile Co.* 206 Mass. 373, 376. And if this precaution is not taken it would be answerable for their value, but not to exceed the amount of the judgment. R. L. c. 189, §§ 57-65. *Cornell v. Mahoney*, 190 Mass. 265, 266. *Thompson v. King*, 173 Mass. 439. The bailment cannot be said to be in violation of any rule of public policy to which common carriers of freight should conform. And upon the further statement in the answer, that the cars were in actual use under the agreement at the time of service and that to carry on its business as a carrier of property independently of the arrangement would be practically impossible, the trustee ought not to be subjected to the expense of unloading and redistribution of their contents, or to the pecuniary loss from interference with the use of the cars which would be incurred if, having been emptied, they were collected and retained unused to await the result of the litigation. *Van Camp Hardware & Iron Co. v. Plimpton*, 174 Mass. 208. *Cox v. Central Vermont Railroad*, 187 Mass. 596, 609.

The trustee not being chargeable, it becomes unnecessary to determine whether the attachment was invalid because of the plaintiff's failure to comply with the provisions of R. L. c. 167,

§ 39, relating to the attachment of railroad cars in actual use making regular passages.

The order of dismissal is affirmed, and the motion of the trustee to be discharged is granted.

So ordered.

ARTHUR KING'S (dependent's) CASE.

Suffolk. January 11, 1915. — February 26, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Workmen's Compensation Act. Evidence, Presumptions and burden of proof.

It seems that under St. 1911, c. 751, Part V, § 2, before it was amended by St. 1914, c. 708, § 13, the employment of a workman for a single day, with no agreement or understanding express or implied extending the service beyond the close of the day's work, was "but casual," so that, if he was killed in the course of his employment on that day, his dependent widow was not entitled to receive an award for his death under the provisions of the workmen's compensation act.

Where in a record of an appeal under the workmen's compensation act it was stated that at the request of the insurer certain "excerpts from the transcript of the evidence" were attached to the decision of the Industrial Accident Board it was *held*, that it could not be assumed that these excerpts stated all the material evidence on the questions presented to this court, and therefore this court could not say that as matter of law there was no evidence warranting a certain finding of the Industrial Accident Board, although the evidence reported in the excerpts did not warrant the finding.

In proceedings before the Industrial Accident Board, in which the dependent widow of a deceased employee seeks to obtain compensation for her husband's death under the provisions of the workmen's compensation act, the burden of proof is upon the dependent to satisfy the board that the employee's service was such as to entitle her to compensation for his death.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board relating to compensation to be paid to Catherine King as the dependent widow of Arthur King.

The appeal was heard in the Superior Court by *Wait, J.* It appeared that the injury that resulted in King's death was sustained when he was working for one Deguio, who was a subcon-

tractor under a contract with the Boston Brick Company, a corporation, which was a subscriber insured in accordance with the provisions of the workmen's compensation act. The report of the Industrial Accident Board contained the following finding: "King was a laborer, he was not hired to do any particular job of work, but was hired by the day, like many men who are employed in day labor, and although the evidence shows, and we find, that he was hired for a single day, the evidence does not show that his employment might not have continued for a longer period, provided he and his employer agreed thereto. In other words, we are not satisfied, on the evidence, that King might not have worked for Deguio for a longer period than a day, provided there was work for him to do and the terms were mutually satisfactory. It seems to us that the burden is upon the insurer to bring King within the exception, and we are not satisfied that the burden of proof has been sustained in this respect. We therefore find and rule that the employment of King was not casual."

The insurer asked the board to make certain rulings, of which the fifth was as follows: "5. King's employment by the Boston Brick Company if any existed was casual. King's employment by the Boston Brick Company if it existed at all was a casual employment and not in the usual course of the trade and business of the alleged employer."

The board refused to make this ruling, and made the following finding: "As to the fifth request, we find that King's employment was not casual, and that the usual course of the Boston Brick Company was to deliver as well as manufacture bricks, and at the time of his injury King was [employed] in the usual course of the trade and business of the Boston Brick Company."

The board found that the employee King was in the employ of Deguio, subcontractor of the Boston Brick Company, at the time of his injury; that the injury arose out of and in the course of his employment; that Deguio was required by the terms of his contract to deliver bricks to the customers of the Boston Brick Company, the latter being a subscriber and insured under the act; that the insurer was required under the provisions of St. 1911, c. 751, Part III, § 17, to pay compensation to the widow of the employee, Catherine King, at the rate of \$6.50 a

week for a period of three hundred weeks from October 8, 1913, the date of the injury.

The report of the board concluded with these words: "At the request of the insurer excerpts from the transcript of the evidence are attached hereto." After the attestation of the report came the following statement: "The following excerpts from the transcript of the evidence are attached at the request of the insurer:" Here followed a copy of certain portions of the evidence before the Industrial Accident Board with an attestation by the secretary of the board that the copy was a true one.

By order of the judge a decree was entered in accordance with the finding of the Industrial Accident Board, awarding to Catherine King as the dependent widow of Arthur King for the period of three hundred weeks from October 8, 1913, a weekly compensation of \$6.50. The insurer appealed.

G. G. Bacon, for the insurer.

W. Hartstone, for the dependent widow.

BRALEY, J. The findings of the Industrial Accident Board, that the employee at the time of the accident which caused his death, while delivering brick in the course of his employment, was the servant of Deguio a subcontractor of the Boston Brick Company, a subscriber of the insurer, were warranted by the evidence. *Morgan v. Smith*, 159 Mass. 570. *Driscoll v. Towle*, 181 Mass. 416, 418. *Delory v. Blodgett*, 185 Mass. 126. *Oulighan v. Butler*, 189 Mass. 287, 290, 291. *Haskell v. Boston District Messenger Co.* 190 Mass. 189, 193. *Bowie v. Coffin Valve Co.* 200 Mass. 571, 578. It would follow under St. 1911, c. 751, Part III, § 17, and §§ 6, 7 of Part II, that the dependent, the employee's widow, would be entitled to the compensation awarded. But, as the accident happened while § 2 of Part V, since amended by St. 1914, c. 708, § 13, was in force, the insurer contends, that, not only was the further finding that the employee's service was not casual unwarranted, but the ruling that the burden of proof rested on it to show the scope of his employment was wrong.

If it be assumed that the "excerpts from the transcript of the evidence" attached to the decision at the insurer's request state all the evidence on this question, the employment was but for a single day. Under the most favorable interpretation for the

dependent there was no agreement or understanding express or implied extending the service beyond the close of the day's work, and the present case cannot be distinguished in principle from *Gaynor's Case*, 217 Mass. 86, and *Cheevers's Case*, 219 Mass. 244, where it was held that, the employment being casual, the employee did not come within the statute.

The assumption, however, cannot be made. It is only "excerpts" which are contained in the record, and it being impossible to say as matter of law that there was no evidence warranting the finding, the fifth ruling requested could not have been given. *Bentley's Case*, 217 Mass. 79, 80.

The burden of proof, however, did not shift. *Carroll v. Boston Elevated Railway*, 200 Mass. 527. The dependent was required to satisfy the board that the employee's service was such as to entitle her to compensation for his death. *New Bedford v. Hingham*, 117 Mass. 445. *Thackway v. Connelly & Sons*, 3 B. W. C. C. 7. *Barnabas v. Bersham Colliery Co.* 3. B. W. C. C. 216. The contrary ruling having been erroneous we are obliged to reverse the decree.

So ordered.

LILIAN M. HOBART vs. MARGARET F. TOWLE.

Suffolk. January 12, 1915. — February 26, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Deed, Reference to plan. Easement.

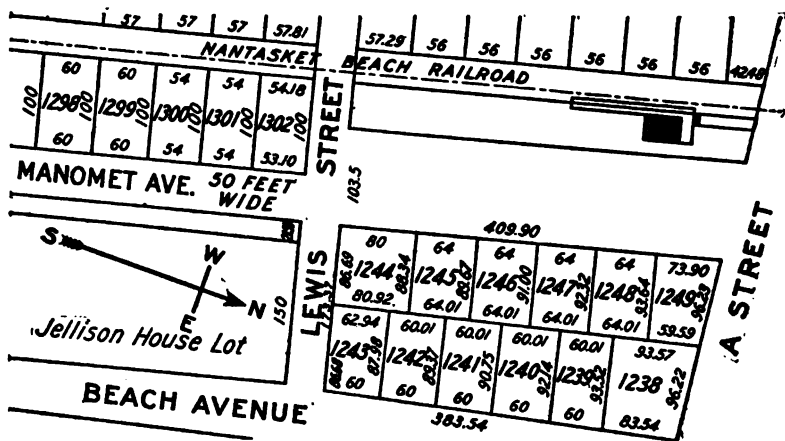
Where on a large plan, upon which streets are designated and blocks of building lots are marked out, there is left in one corner of the plan a blank space more than one hundred feet wide adjoining a railroad location and beyond the end of a certain street that is marked as fifty feet wide, so that, if the designated street were extended, as it afterwards was, at the width of fifty feet, there would be a remaining space more than fifty feet wide available for house lots, the mere fact that the space is left blank on the plan without any marks dividing it into house lots does not show necessarily an intention, in a deed conveying the house lots on the line of the extension of the street opposite the open space, which was made by a grantor who also owned the open space and referred to the plan, that this land should be left open or should be added to the width of the street,

and it properly can be found that the strip of land thus left blank on the plan simply was regarded as undeveloped land and that by the reference to the plan in the deed no easement in the strip was created by grant or implication for the benefit of the lots of land on the opposite side of the extension of the street fifty feet wide.

PETITION, filed in the Land Court on October 14, 1913, for the registration of the title to a parcel of land with the buildings thereon at Nantasket Beach in the town of Hull.

The case was heard by *Davis, J.*, who made a decision in substance as follows:

The land in question in this case consists of a strip about four hundred and twenty feet long by fifty feet wide, and lying between A and Lewis Streets adjoining the Waveland railroad station in the town of Hull. In 1885 the Nantasket Company, which at that time owned all the land in the vicinity, recorded in the registry of deeds a plan of its land at Nantasket Beach. The following is a reduced copy of the northeasterly corner of the plan. On



the plan there is shown a way running from far to the south of the property in dispute and labelled "Manomet Avenue 50 feet wide." This way apparently stops at the southerly line of Lewis Street. Between the northerly line of Lewis Street and the southerly line of A Street there is a prolongation of the easterly line of the avenue with a block of lots to the east thereof. Westerly of this block of lots, and between it and the land of the railroad

taken for station purposes, is a blank space. Between the southwesterly corner of this block and the southeasterly corner of the railroad land, on a line with the northerly line of Lewis Street, are the figures "103.5."

In 1886 the trustees of the Nantasket Company conveyed to one Norwell, the predecessor in title to the respondent, the block of lots, describing them as being lots numbered 1238 and 1249 inclusive on the plan, and bounded "westerly by the easterly line of Manomet Avenue extended 409.90 feet." In 1887 the trustees conveyed to one Jordan a number of lots on the plan, and also all and singular any and every other parcel or parcels of land situated at Nantasket Beach. In 1913 the trustees under the will of Jordan conveyed to the petitioner a parcel of land as shown on the plan, between A Street and Lewis Street, bounded "easterly by the extended westerly line of Manomet Avenue shown on said plan extended northerly from Lewis Street to A Street about 410 feet." By deed, dated and recorded since this petition was filed and the examiner's report was made, the Jordan trustees conveyed to the town of Hull all right, title and interest in "the parcel of land being the continuation of Manomet Avenue shown on said plan running northerly from Lewis Street to A Street."

The respondent contends that under the deed to her predecessor Norwell there passed as appurtenant to her land the right to have the entire space of 103.5 feet wide between her land and the station property of the railroad kept open as a part of Manomet Avenue extended from Lewis Street to A Street. "I am unable to agree with this contention. If the plan had shown Manomet Avenue as running from the south fifty feet wide as far as Lewis Street and from that point extending with a width of 103.5 feet to A Street, the contention would be sound; but it did not. It seems to me that it most distinctly showed Manomet Avenue to be a fifty foot street stopping at the southerly line of Lewis Street, and then a vacant space 103.5 feet wide lying between Lewis and A streets. If this were all, however, it could perhaps still be fairly contended on behalf of the respondent that such vacant space was represented to be an open space, and that she is entitled to have it maintained as such. But the Norwell deed expressly provided for the extension of Manomet Avenue through this open space 103.5 feet wide, and this has been done. There remained

an unoccupied strip of land between Manomet Avenue extended and the railroad land suitable for development into house lots.

"It seems to me that the plan showed a certain scheme of streets and avenues, with some blocks divided into lots and others not; and that the vacant space in question indicates rather a space as to which the plan was not yet developed, than a space dedicated as an open space for the benefit of the respondent's lots. The provision in the sale to the respondent for the extension of Manomet Avenue, the sale of Jordan, the extension by his estate of Manomet Avenue as provided for in the Norwell deed, and the subsequent sale of the remaining row of lots to the petitioner, is all consistent with the plan. The space is not needed for the purpose of access to the Waveland station, because ample access is had from A Street, from Lewis Street and from the broad strip of land running between A and Lewis Streets on which the railroad station is built. The case does not seem to me to be at all like *Farnsworth v. Taylor*, 9 Gray, 162, and other cases cited by the respondent, but more like the situation in *Attorney General v. Vineyard Grove Co.* 211 Mass. 596, and the Copley Square cases cited by the examiner.

"On the agreed facts submitted in this case I rule that the respondent has no easement by grant, express or implied, in the land claimed by the petitioner."

By order of the judge a decree was entered for the petitioner; and the respondent appealed.

The case was submitted on briefs.

J. Cavanagh, for the respondent.

G. E. Curry & C. L. Newton, for the petitioner.

BRALEY, J. The lands owned by the parties are part of a large tract of unimproved sea shore property formerly owned by the Nantasket Company, which laid it out into building lots with streets or ways shown by a plan duly recorded. By the plan Manomet Avenue, fifty feet in width and one of the principal ways, apparently did not extend beyond the southerly line of Lewis Street, which it intersected, leaving between this line and A Street, the boundary on the south, a parcel of undesignated land of approximately three quarters of an acre. The company very shortly after conveyed the property to trustees who deeded by their numbers certain lots, which included the lots now owned

by the respondent, to one Norwell, bounding them westerly by the easterly line of Manomet Avenue extended southerly "409.90" feet; a distance sufficient to carry the avenue to A Street. The deed also contained the further provision that the grantors reserved the right to change, lay out anew or discontinue any street shown on the plan not necessary for convenient ingress and egress from the granted premises. But as the respondent's lots had no other means of access shown by the plan the grantors and their privies in estate by this description were estopped from claiming that for a width of fifty feet and for its entire length the vacant space had not been appropriated as a part of Manomet Avenue as finally completed. *Cole v. Hadley*, 162 Mass. 579. The respondent derives title by deed from Norwell. The lots conveyed, as we have said, were only a part of his purchase, and after designating them by the numbers appearing on the plan they are bounded westerly by Manomet Avenue as extended. It thus appears that the fee in the extension of the avenue, which they have since conveyed to the town of Hull, remained in the grantors. *McKenzie v. Gleason*, 184 Mass. 452, 458, 459. And it is to be inferred from the agreed facts that, since the parties bought, the avenue for its entire length has become a public way fifty feet wide. The respondent therefore is forced to contend that only the remaining portion, comprising a little more than one half of the area which the trustees afterwards conveyed to the petitioner, who asks to have her title registered free from such incumbrance, must be left open and unimproved for the benefit of her estate. It is manifest from the record that this parcel always has been eligible for building lots, and the circumstance that the plan contains no subdivision is not as matter of law decisive. *Donnelly v. Butler*, 216 Mass. 41, 43. The intention of the owner where there is no specific delineation is to be ascertained from all the circumstances. *Attorney General v. Vineyard Grove Co.* 211 Mass. 596. *Lipsky v. Heller*, 199 Mass. 310. *Wilson v. Massachusetts Institute of Technology*, 188 Mass. 565. The tier of lots abutting on the avenue as extended, with the exception of the corner lots, were inaccessible to the public ways before the extension, in so far as the plan itself conferred any right of access to purchasers. It cannot be inferred that after having them plotted the company did not intend to sell, and it like-

wise is improbable that it also purposed to leave the remaining land unsold, which by the extension would be materially increased in value. It also is of much significance, that no other unmarked areas appear upon the plan. If the company intended to provide open squares or spaces for the benefit of the lot owners or the public, and thereby enhance the value of the lots, and induce purchasers to buy, the inference that it would have provided more than one open space located in the extreme northeasterly corner seems unavoidable. The further fact, that it is bounded westerly by land of the railroad company and is unnecessary as a means of access to the station, strengthens the presumption that when the plan was prepared the strip in question was regarded as undeveloped land. *Peck v. Conway*, 119 Mass. 546. *Attorney General v. Whitney*, 137 Mass. 450, 455, 456. *Donahue v. Turner*, 204 Mass. 274. *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217. The judge having been warranted in so finding, his ruling that no easement by grant or by necessary implication attached to the petitioner's land for the benefit of the respondent's lots was right.

Order for decree affirmed.

JANE N. WHEELER vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 14, 1915. — February 28, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, Street railway. Carrier, Of passengers.

If, while an open electric street railway car is stationary at the last regular stopping place at one end of its route and is about to go round a curve before returning in the opposite direction on the other parallel track, a woman, for the purpose of taking the car on the return trip, without any objection from the conductor gets on the running board and walks along it preparatory to taking a seat by the side of a companion who got on the car at the same time, whereupon the conductor gives the signal to start the car, and the car starts and in rounding the curve gives a lurch, throwing the woman to the ground, in an action brought by her against the corporation operating the railway for her injuries thus sustained, the question of her due care is for the jury.

If in such action the jury find, on evidence warranting such a finding, that the manner of passing from one track to the other was unknown to the plaintiff

and that she was at a point where cars apparently made regular stops not merely for the discharge of passengers but also for their reception, they further can find that the plaintiff offered herself as a passenger and that the conductor accepted her as one, and, so finding, it is for the jury to determine whether the conductor thereafter exercised reasonable care toward the plaintiff as a passenger.

TORT for personal injuries sustained on July 23, 1912, when the plaintiff was alleged to have been a passenger on an open electric street railway car of the defendant on Atlantic Avenue in Boston, as the car was going round the curve at the end of its route preparatory to starting on its return trip to Roxbury Crossing after having discharged its passengers at its regular stopping place at Rowe's Wharf. Writ dated December 11, 1912.

In the Superior Court the case was tried before *Wait, J.* At the close of the evidence, which is described in the opinion, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. J. Hartnett, for the plaintiff.

E. P. Saltonstall, for the defendant.

BRALEY, J. The jury would have been warranted in finding on the evidence that the plaintiff, accompanied by other women, desiring to take passage, boarded the defendant's open car while it was stationary at a regular stopping place by stepping on to the running board near the front end, and, while the plaintiff was walking along the running board preparatory to taking a seat by the side of a member of her party, the conductor gave the signal to start the car. It started, and after moving a short distance and while rounding a curve the car jerked or lurched, throwing her to the ground.

The question of the plaintiff's due care, under these circumstances, was a question of fact for the jury. *Gordon v. West End Street Railway*, 175 Mass. 181. *Mason v. Boston & Northern Street Railway*, 190 Mass. 255, 257, and cases cited. *Pomeroy v. Boston & Northern Street Railway*, 193 Mass. 507, 512. *Hamilton v. Boston & Northern Street Railway*, 193 Mass. 324. *Vine v. Berkshire Street Railway*, 212 Mass. 580, 581. *Killam v. Wellesley & Boston Street Railway*, 214 Mass. 283.

If, however, the plaintiff had not become a passenger, the conductor was not negligent in starting the car before the plain-

tiff had an opportunity to reach a position of safety. *Yancey v. Boston Elevated Railway*, 205 Mass. 162.

It is undisputed that the car had reached the end of the journey on the north bound track, where the plaintiff got on, and had stopped to discharge passengers before passing around the loop to the south bound track, and the conductor had begun to reverse the seats. But he testified on cross-examination, that he saw "these people boarding the car," and that he "made no objection to their boarding" and, in contradiction of the plaintiff, said that he saw her "step out of the car on to the running board" and "warned her not to step off."

The jury could find on the plaintiff's evidence that this mode of passing or changing from one track to the other was unknown to her and that she was at a point where cars apparently made regular stops, for not merely the discharge but the reception of passengers. If they so found, a majority of the court are of opinion that they further could find on the conductor's testimony previously quoted that the plaintiff had offered herself as a passenger, and, having been accepted, the relation of passenger and carrier existed at the time of the accident, and that whether the conductor exercised reasonable care thereafter was for their determination. *Lockwood v. Boston Elevated Railway*, 200 Mass. 537. *Lauchtamacher v. Boston Elevated Railway*, 214 Mass. 103, 104.

The verdict for the defendant having been ordered improperly, the exceptions must be sustained.

So ordered.

INSTITUTION FOR SAVINGS IN NEWBURYPORT AND ITS VICINITY vs. INHABITANTS OF BROOKLINE.

Norfolk. January 14, 1915. — February 26, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Damages, For property taken or impaired under statutory authority. *Way*, Public, Private. *Easement*. *Evidence*, Of extent of easement, Of agency. *Agency*, Existence of relation. *Savings Bank*. *Corporation*, Officers and agents. *Practice*, Civil, Judge's charge.

At the trial of a petition against the town of Brookline for the assessment of damages due to the taking of one half of a path, which provided a convenient

means of communication between a much used street and a populous residential section on a hill, where it appears that one, who had been the owner of the path and of the land from which a large part of the residential section was developed, had made the path subject to an easement of use "for all the purposes for which such passageways now are or at any time hereafter may be commonly used in said town of Brookline," evidence is admissible, for the purpose of proving that no greater servitude existed after than before the taking, of the physical uses made of similar paths in Brookline as a means of access to the lots adjoining and of passing from one street to another and for the construction of drains and sewers and for the installation of gas, electricity and water, irrespective of the provisions of the deeds, instruments or public acts which created them.

At the trial of a petition by a banking corporation against a town for the assessment of damages due to the taking of one half of a path for a public footpath, the judge, subject to an exception by the petitioner, admitted in evidence a letter, written to the chairman of the selectmen of the town before the taking with regard to the town assuming care of the path by one, who enclosed with the letter a copy of a letter to the banking corporation from an owner of land adjoining the way demanding that the path be taken care of. The writer of the letter testified that he did not know how he came by the enclosed copy, that he "tried to sell and looked after the house on the petitioner's lot," and "that he had general charge" of it to that extent. The letter stated that the petitioner would be willing at any time to execute any conveyance or release which might be required if it should be found necessary or desirable to transfer any fee in the way to the town. There was evidence that the letter was written after a consultation between the writer and the president of the bank. *Held*, that the letter was inadmissible for any purpose, because the authority of its writer to bind the bank could not be shown from his statements, and there was no evidence that the president of the bank had any authority to delegate power to him.

The error committed by the admission of such letter was not cured by an instruction to the jury not to consider the letter unless they were satisfied of the authority of the writer to bind the bank; because on the evidence the jury would not have been warranted in any event in finding the existence of such authority.

The president of a savings bank has no authority merely by virtue of his office to delegate power to another to write a letter to a town containing offers or admissions as to the value of the bank's interest in a certain path in a town.

The owner of the fee in one half of a passageway in the town of Brookline, which provides a convenient means of communication between a much used street and a populous residential district on a hill and which is subject to an easement of use "for all the purposes for which such passageways now are or any time hereafter may be commonly used in said town of Brookline," has no right to build a structure over his half of the way nor to construct buildings which will drop snow, ice or water from their roofs upon it.

PETITION, filed in the Superior Court on September 23, 1904, for damages caused to the petitioner by the laying out of Summit Path in Brookline as a public footpath.

The case was tried before *Fox, J.* It appeared that the petitioner owned one half of the path, divided longitudinally, that it ran from Beacon Street to Lancaster Terrace, was somewhat steep, was constructed of stone and plank steps and walks and was bordered by bushes and shrubs. The path was built by the petitioner's predecessor in title, Eben D. Jordan, as a part of a scheme for the development of property owned by him on the hill, and in all deeds by him of land in the vicinity the path was made subject to an easement or right of use "for all the purposes for which such passageways now are or at any time hereafter may be commonly used in said town of Brookline."

At the trial, Alexis H. French, the town engineer of Brookline, was asked how many passageways there were in Brookline similar to Summit Path physically at the time "in 1894 or thereabouts" when it was laid out. Subject to an exception by the petitioner, the witness answered that there were ten or twelve. Subject to further exceptions by the petitioner, who contended that the provisions of the deeds, instruments or public acts, which created such paths, first should be shown in order to ascertain whether the easements as to their use were similar to those of Summit Path, the witness, in reply to a question as to the use made of those passageways that had been accepted by the town, made the following statement:

"Of course they are used as means of access more frequently than anywhere else to get to lots that were high up on the side hills, where the roads were circuitous and long, while a short-cut on the slope, with flights of steps, would make it possible to get to the high land that would involve a quarter of a mile of travel by highway; . . . they are used some for sewers and drains: as access, to the back entrance to the houses fronting on the streets and whose backways were connected, — whose rears to whose lots were reached by, — over these passageways, so that the butchers and milkmen and provision dealers and all those people seeking to reach the back entrances would use the public path rather than to maintain a private path. Such paths are also used for water, gas and electric conduits, also poles and wires to a certain extent, and that there was a sewer or drain in part of this path at the time the town accepted it, a surface drain and not a sewer; this was constructed in that portion of

the path from Beacon Street to a point where the path changes direction."

Subject to exceptions by the petitioner, one William H. White testified, as to uses made of similar paths in Brookline, "First as a passageway, access from one street to another, from one property to another; drainage and maintaining of poles and wires for lights. . . . Some of these paths had poles and wires, some not."

One John D. Hardy testified that he "tried to sell and looked after the house on the petitioner's lot of land; . . . that he had general charge of this property to the extent above stated; that the petitioner asked him to take charge of this property and placed it in his hands to a certain extent;" that he had received a certain letter addressed to the petitioner from Edward E. Blodgett, Esquire, who owned property at the corner of Summit Terrace and Summit Path, calling the petitioner's attention to the bad condition of the path as to snow and ice, stating that in case of accidents the owners of the path would "be held responsible for injuries resulting therefrom" and suggesting that it was possible, if the petitioner desired, "to deed the passageway to the town that the town would accept the same and lay it out as a public way and then that the town would assume control of it." Hardy testified that this letter "must have come to him from the petitioner; that he could not recall how that letter came to him; . . . that afterwards he took pains to look through every record he had or could find, and could not find anything which would show where this letter came from or how it came to him."

Subject to an exception by the petitioner, the following letter from Hardy to the chairman of the board of selectmen of Brookline, in which was enclosed a copy of the letter from Mr. Blodgett to the petitioner, was admitted in evidence, "not as evidence of a waiver by the bank of damages."

"Dear Sir:—The Institution for Savings in Newburyport and its Vicinity sent me a letter written them by Edw. E. Blodgett of which a copy is enclosed. Will it not be possible for the town to care for this passageway? If the facts as to ownership and what the owner is required to do are as stated by Mr. Blodgett, I have no knowledge of them, as the passageway is wholly outside the so called Jordan Estate and is used by persons passing between

Beacon Street and the street above it, the same as other public passageways, in the town are used, it seems to me that it may be proper for the town to assume its care. We shall wish to do not only what we are compelled to do but what it is proper for us to do in the matter and therefore will thank you if you will be good enough to advise me on the above suggestion. The Bank will, of course, be quite willing at any time, now or later, to execute any conveyance or release which may be required if it shall be found necessary or desirable to transfer any fee in the Way to the Town."

Other material evidence is described in the opinion.

At the close of the evidence, the petitioner asked for the following rulings among others:

"5. In estimating the damages, the jury may also consider that prior to said taking the petitioner had a right to build over the way in such a manner as would not obstruct the passing of persons having the right to pass to and fro over said way, and that the petitioner by the laying out has been deprived of any advantage by reason of the right so to build over the way."

"7. In estimating the damages, the jury may further consider as a matter of law that the petitioner by the laying out of the way has been deprived of the right to prevent poles and wires for the purpose of transmitting electricity for light, heat, and power, for telephone and telegraph poles, from being set in the way, has been deprived of the right to erect a barbed wire fence along its length, has been deprived of the right of having buildings erected upon its remaining land, drop snow, ice or water from the roofs thereof upon the way."

The judge charged the jury with regard to the several requests, in substance as follows:

"All agree, gentlemen, and I instruct you, that the town, as the owner of this public way, has the right, if it desires, to establish upon it any telegraph poles and electric light poles. That is considered a proper public use for a way. The request, however, implies that the abutting owner had the right to prevent the erection of poles before this way was taken by the public. Well, nobody could put any poles or wires, certainly, into that way before this town took it except those who had an easement; that is, Mr. Blodgett and his neighbors on the hill, who had ob-

tained this easement. There was something in the evidence to indicate that some passageways had been used for light and for telegraph poles, although I cannot undertake to say to you on the evidence whether Mr. Blodgett and the rest would have a right to run a line of poles down there or not. . . . I certainly should not say to you that before this way was taken by the town, Mr. Jordan would have had a right to put a building upon the line of this passageway and to have that so that that building would drop snow and ice upon this way, because, as I have already said, having granted this right of passageway he would have no right to obstruct it. If he put up a building in such a way that it dropped snow and ice into the passageway, or obstructed it in that way or made it dangerous, he might be responsible for that."

With regard to the letter written by Mr. Blodgett to the Institution for Savings and the letter written by Hardy to the chairman of the selectmen, the judge charged the jury as follows:

"I have been asked to rule and do rule that they are not to be treated as estopping the Newburyport Savings Bank from making a claim for damages. They are admissible, if at all, only as evidence as an admission against the Institution on the question of what value, Hardy, as the agent for the Savings Bank, put upon this half of the passageway at that time. And they are not to be used or considered by you at all unless you find upon all the evidence that Hardy, as the agent, had authority from the Bank to write this letter to the town."

The jury found for the petitioner in the sum of \$1. The petitioner alleged exceptions.

N. N. Jones, for the petitioner.

W. D. Turner, (*G. Hoague* with him,) for the respondent.

BRALEY, J. The petitioner at the date of the taking owned in fee one half of the footway, the whole of which was subject to an easement of passage for the benefit of the owners of abutting estates and of other estates in the vicinity of its northerly entrance for all purposes for which such passageways "now are or at any time hereafter may be commonly used" in the defendant town. It undoubtedly was impossible to exclude the general public, as the way provided a convenient means of communication between a much used street at the southerly entrance and a

populous residential section. By the terms of the grant the user is not restricted in terms to the owners of the dominant estates, their servants and agents, and the jury could find that the way was open for all purposes for which such passageways commonly were used.

The petitioner's damages being limited to the real value of the land taken and the injury to its remaining land, the evidence introduced by the respondent as to the physical use of other similar ways was admitted properly. It tended to show that no greater servitude existed after than before the taking, and within reasonable limits, which do not appear to have been exceeded, the witnesses could describe the conditions of travel over such ways. And, if it appeared that the petitioner's property had been benefited, the benefits could be set off against the damages. R. L. c. 48, § 84. R. L. c. 48, §§ 65-85. *Chase v. Worcester*, 108 Mass. 60, 66. *Beale v. Boston*, 166 Mass. 53, 55. *Allen v. Boston*, 159 Mass. 324. *Cole v. Boston*, 181 Mass. 374. *Ham v. Salem*, 100 Mass. 350.

The respondent also could prove by competent evidence, that the petitioner had offered to waive compensation and transfer the fee if the town would make the path a public way. *Brown v. Worcester*, 13 Gray, 31, 36. But the letter of Hardy containing this offer was admitted improperly. If the jury on his evidence could find, that it had been written after, and not before consultation with the petitioner's president, and the petitioner had received the letter of Blodgett, in which the proposal that the bank should make such conveyance appears, and transmitted it to Hardy, there is no evidence that the president had been authorized to make the proposition or complete the transfer. The declarations of an agent and his acts are not of themselves evidence of his authority binding his alleged principal. *Brown v. Leach*, 107 Mass. 364. *Short Mountain Coal Co. v. Hardy*, 114 Mass. 197, 213. *Fletcher v. Willis*, 180 Mass. 243. See *Williams v. Dugan*, 217 Mass. 526. To make the evidence admissible it was necessary for the respondent to introduce some evidence that the president had been authorized by either a by-law of the bank or vote of the trustees to consent to the taking and to waive all claim for damages. It cannot be inferred that he possessed such powers solely by virtue of his office. R. L. c. 113, §§ 14-20.

St. 1902, c. 169, § 1. *Greenfield Savings Bank v. Abercrombie*, 211 Mass. 252, 255, 256. *Gerrity v. Wareham Savings Bank*, 202 Mass. 214, 219. *New England Mutual Life Ins. Co. v. Wing*, 191 Mass. 192. Nor did it follow from what the president is purported to have said, that he authorized or delegated Hardy to make the offer in the bank's behalf. *Spaulding v. Jennings*, 173 Mass. 65, 67. *Chaffee v. Blaisdell*, 142 Mass. 538. The instruction, that the jury were not to consider the letter with the enclosure unless satisfied that Hardy had authority to act as the petitioner's agent, did not cure this error. It necessarily assumed that the evidence might be found as matter of law sufficient to prove agency.

The petitioner having excepted seasonably to the admission of the letters and to the instruction, this exception must be sustained.

The other exceptions, which in so far as argued relate to the failure to give the fifth and seventh requests as framed, are not meritorious. The petitioner by the wording of the grant or grants creating the easement could not obstruct or arch over its half of the way. If it had this right the other abutters also possessed it, and the way could be encroached upon indefinitely until nothing but a narrow dark and dangerous path would remain. It is also plain from all the evidence, that the right of passage included the entire width open to the sky except possibly as narrowed by the shrubbery planted and maintained apparently by common consent along part of the borders. *Lipsky v. Heller*, 199 Mass. 310, 318. If before the laying out by the respondent other paths had been used for the location of telegraph, telephone and electric light poles, and the jury could find that the petitioner had been deprived of a similar use, the judge was not required to rule in the language requested, and the instructions amply protected its rights. *Graham v. Middleby*, 185 Mass. 349.

Exceptions sustained.

BARBER ASPHALT PAVING COMPANY *vs.* LUKE D. MULLEN & others.

Suffolk. January 15, 1915. — February 26, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Guaranty. Release. Accord and Satisfaction. Payment.

In a suit in equity for the enforcement of a guaranty by the defendant of the payment to the plaintiff by a corporation of the price of certain goods shipped to the corporation by the plaintiff, it appeared that, in compliance with certain provisions of the contract, the plaintiff had given notices to the defendant as the payments came due, that before a final payment was made the plaintiff rendered to the principal debtor a statement which was incorrect in that it overstated the amount of a credit of which the plaintiff had given the debtor a memorandum, and understated the balance due, that the debtor forthwith sent the statement to the defendant, that the defendant caused the check of a stranger to the transaction for the erroneous balance to be sent to the plaintiff with a letter stating that it was sent as "the final payment" under the guaranty and requesting a return of the receipt to the maker of the check, that the plaintiff receipted the statement and returned it to the stranger with a letter stating that the check was received "in final settlement" of the account of the principal debtor, and that seven weeks later the error was discovered and the defendant was notified. *Held*, that there was no release or discharge of the principal debt nor any accord and satisfaction, and that the principal debt and the guaranty remained in force.

Where, in a suit in equity by a creditor to enforce a guaranty, a master finds that the plaintiff through a mistake rendered to the debtor a statement of a balance of the debt due which was too small by \$3,600 and at the debtor's request the amount of the erroneous balance was paid to the plaintiff by the guarantor, that the guarantor was notified by the creditor of his mistake seven weeks later, that during the first three of those seven weeks there was a debt owing to the debtor by a stranger which the guarantor might have attached in an action against the debtor and that the debtor was insolvent during the seven weeks and at the time the suit was brought, the guarantor is not discharged, because he has failed to sustain the burden of proof, which was on him, of showing that, when notified of the creditor's error, he had lost any material pecuniary advantage against his principal which he might have enforced had no mistake been made by the creditor.

BILL IN EQUITY, filed in the Supreme Judicial Court on April 23, 1914, to establish a debt alleged to be due to the plaintiff by reason of a guaranty by the defendant Mullen of the payment to the plaintiff of certain obligations of the Boston Paving Company,

and to reach and apply in payment of Mullen's debt shares of the capital stock of certain foreign corporations, which also were made defendants.

The guaranty was contained in a letter of Mullen to the plaintiff requesting it to make certain shipments of paving blocks to the Boston Paving Company and continuing as follows: "In consideration of such shipment the undersigned hereby guarantees payment of all moneys becoming due for wood blocks shipped under said order to the Boston Paving Company and agrees that in case of failure on the part of the Boston Paving Company to pay for same from time to time as shipments are made and payment covering same becomes due that he will promptly pay for same on receiving written notice from you within thirty days from the date or dates that any such payment or payments become due that same have not been paid."

The case was referred to David A. Ellis, Esquire, as master. Material facts stated in his report, which was confined to the facts bearing on the issue, whether the defendant Mullen was liable upon the guaranty, were as follows:

The paving blocks, which the defendant Mullen in the letter of guaranty requested the plaintiff to ship to the Boston Paving Company, were shipped, and the plaintiff gave Mullen due notice thereof. These shipments were made on August 6 and 26, November 21 and 24, 1913. Because of a dispute between the plaintiff and the Boston Paving Company as to the quality of certain of the blocks, an adjustment was made between them which resulted in the plaintiff giving to the Boston Paving Company on December 6, 1913, a credit memorandum amounting to \$1,474.96. The Boston Paving Company did not communicate this fact to Mullen.

On December 31, 1913, the plaintiff sent to the Boston Paving Company a statement of account which contained an error in that the above described credit was stated as \$4,986.86 instead of \$1,474.96, and the balance due as \$126.83 instead of \$3,638.73. The Boston Paving Company sent this statement forthwith to the Suffolk Realty Company, and on January 12, 1914, the Suffolk Realty Company sent a check to the plaintiff for \$126.83 in a letter enclosing the statement and stating that the check was sent as "the final payment from the Boston Paving Company

under the guarantee of L. D. Mullen." The plaintiff on January 13, 1914, wrote to the Suffolk Realty Company a letter enclosing the statement duly receipted and acknowledging the receipt of the letter "enclosing us check for \$126.83 in final settlement of the account of the Boston Paving Company." On March 5, 1914, the plaintiff, having discovered the error in the account, notified Mullen of that fact.

Mullen was president of the Suffolk Realty Company. This was known to a broker employed by the plaintiff to make sales for it. It was not otherwise known to the plaintiff.

Mullen saw the statement of December 31, 1913, and ordered the payment to be made by the Suffolk Realty Company.

On January 13, 1914, Warren Brothers Company owed the Boston Paving Company \$276.92, which it paid on February 4, 1914. The master found: "Mullen knew, between January 1 and March 6, that the Boston Paving Company were doing work for Warren Brothers Company, but not the particulars of what was done or what was due. He did not know till after March 6 that the above payment was due." "This sum might have been attached by the defendant Mullen, to secure him under his guarantee, if he had known of the mistake of the Barber Asphalt Paving Company."

"Except for the foregoing no change took place in the financial affairs of the Boston Paving Company or the defendant Mullen's relations with it between the date when the erroneous statement was sent to the Suffolk Realty Company and the date when the defendant Mullen received from the plaintiff notice of the mistake.

"The Boston Paving Company, at the time that notice was given to the defendant Mullen of the mistake, had no property whatever which the defendant Mullen could attach, or out of which he could secure reimbursement for the payment of his guarantee to the Barber Asphalt Paving Company. At the time said notice was given, and now, the Boston Paving Company was and is insolvent, owing more than \$10,000, and it is impossible to obtain payment from it, either by the Barber Asphalt Paving Company, or by the defendant Mullen, under his guarantee."

Loring, J., made an interlocutory decree ordering Mullen to

pay to the plaintiff \$3,748.36, with interest from November 10, 1914, and declaring that jurisdiction of the cause was retained for the purpose of enforcing the payment of this decree. The single justice then reported the case upon the bill, the answer of Mullen, the replication, the master's report, the interlocutory decree and Mullen's appeal therefrom for determination by the full court.

The case was submitted on briefs.

J. E. Eaton & E. T. McKnight, for the defendant Mullen.

R. W. Hale, for the plaintiff.

BRALEY, J. The defendant as guarantor became bound upon notice within thirty days from maturity for all moneys due the plaintiff from the sale of wood paving blocks to the principal debtor, and under the admissions in the answer, and the master's report, he is liable for the amount claimed unless relieved by the conduct of the plaintiff. *Cumberland Glass Manuf. Co. v. Wheaton*, 208 Mass. 425, and cases cited.

If by reason of a clerical error in bookkeeping the bill rendered to the principal debtor as a statement of the final payment was very largely below the amount actually owing, the acceptance of the check in settlement, and the sending of the letter with the statement receipted, did not release it from liability for the unpaid balance. *Grinnell v. Spink*, 128 Mass. 25. It also is immaterial that the check was made by a third party. The statement, even if returned at its request to the maker and sender of the check, was open to explanation by extrinsic evidence. *Hildreth v. O'Brien*, 10 Allen, 104. Nor was it a discharge in writing of the debt or an accord and satisfaction within the doctrine of *Guild v. Butler*, 127 Mass. 386, 390. The notice to the defendant upon discovery of the mistake having been given within thirty days from default and the debt still existing, there was a compliance with the terms of the guaranty. *Cumberland Glass Manuf. Co. v. Wheaton*, 208 Mass. 425.

But it is further contended that as the debtor at the date of the notice of the mistake had no attachable property which he could reach for reimbursement, although at the time of sending the bill and check it had credits subject to trustee process, the defendant has been damnified by the plaintiff's negligence, and hence is discharged. It is clear, however, from the master's findings,

that the principal debtor had become insolvent, and the defendant on whom rested the burden of proof, failed to show that when notified of the error in computation with a demand for payment, he then had lost any material pecuniary advantage against his principal which might have been enforced, if the original statement of the final indebtedness had been as represented. *Cumberland Glass Manuf. Co. v. Wheaton*, 208 Mass. 425. *Welch v. Walsh*, 177 Mass. 555.

The decree for the plaintiff must be affirmed with costs.

Ordered accordingly.

J. FRANK WELLINGTON vs. CITY OF CAMBRIDGE.

Middlesex. January 18, 1915. — February 26, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Dock. Easement, By prescription. *Practice, Civil*, Judge's charge. *Damages*, For property taken or impaired under statutory authority. *Evidence*, Of damage to property.

The owner of a wharf adjoining a private dock, who holds by deed the title only to the part of the dock that would be enclosed by the projection of the side lines of his wharf to the centre of the dock, by continuing for more than twenty years under a claim of right the practice of having the forward hatches of vessels unloading coal at his wharf overlap the adjoining wharf by more than two thirds of the vessels' length without interfering with any right of the public in navigable waters, acquires an easement by prescription in the part of the dock beyond the limits of the land described in his deed, so that, when his wharf and his interest in the dock are taken by a city under statutory authority for the construction of a bridge, he is entitled to have included in his damages compensation for his right to overlap the adjoining wharf when unloading vessels.

A presiding judge in charging a jury may use illustrations to enable the jury more fully to understand and apply the law governing the case as stated to them by the judge. At the trial of a petition for the assessment of damages for the taking by a city under statutory authority of a wharf and a portion of a dock and certain easements in the dock belonging to the petitioner, where the presiding judge, in illustrating the nature of the special and peculiar damage alleged to have been sustained by the petitioner in regard to access to his wharf, made use of the example of a hole in a highway which caused to all the public the inconvenience of passing round the hole and to a man who fell into it and broke his leg a special and peculiar damage, it was *held*, that the illustration and its application were proper.

A statement in the charge of a presiding judge that "the case will undoubtedly go to the Supreme Court" and a statement that the meaning of a certain special statute "will be ultimately for the Supreme Court," were held in the present case not to exceed the discretionary powers of the judge as to the mode in which the attention of the jurors should be directed to the importance of the questions presented, where it was apparent that no rule of law was stated incorrectly and that the attention of the jury was not turned aside from the issues which they were to determine.

Upon a petition for the assessment of damages for property taken for a public purpose under statutory authority, the jury may consider any and all uses to which the property could be appropriated properly, and the determination whether any use to which it is testified that it could be put is too indefinite and prospective to be considered by the jury is largely within the discretion of the presiding judge.

Where, at the trial of a petition for the assessment of damages for the taking by a city under statutory authority of a wharf and a portion of an adjoining dock and certain easements in the dock belonging to the petitioner, including the right to have the forward hatches of vessels unloading coal at the wharf overlap the adjoining wharf by more than two thirds of the vessels' length, it is within the discretion of the presiding judge to admit evidence offered by the petitioner as to the estimated annual cost of trimming coal between the forward and middle hatches to the rear hatch of the coal barges before they could be unloaded and to show that because of the loss of time thus caused the petitioner also would lose the premium paid by the transportation companies for the speedy discharge of cargoes.

PETITION, filed on May 7, 1908, against the city of Cambridge under St. 1903, c. 372, § 4, for the assessment by a jury of damages for injury to property of the petitioner from the construction of a bridge with a draw across the Lechmere Canal, so called, in continuation of the lines of the highway known as Commercial Avenue.

In the Superior Court the case first was tried before *Hitchcock, J.* The jury found for the petitioner in the sum of \$15,365.61, and exceptions alleged by the respondent were sustained by this court in a decision reported in 214 Mass. 35.

There was a new trial of the case before *Fessenden, J.*, at which the evidence was presented that is described in the opinion. The jury and the presiding judge also viewed the petitioner's premises.

At the close of the evidence the respondent asked the judge to make the following rulings, which are referred to in the opinion, besides others that have become immaterial because the exceptions to the refusals to make them were not argued:

"6. The occasional tying up of a vessel in front of the peti-

tioner's wharf in such a manner that vessels lapped over beyond the side lines of the petitioner's land does not as a matter of law give to the petitioner a title by prescription in the part of the dock thus occupied."

"10. Upon all the evidence, the jury would not be warranted in finding that the petitioner had a title to the dock or any part thereof in front of Smith's wharf."

"12. If the jury find that it was the custom among the owners of the various wharves abutting on Lechmere Canal to permit vessels lying at their respective wharves to lap over upon the land of their abutters and that this custom had been followed for a number of years without objection from any of the wharf owners, and if the jury find that vessels unloading at the petitioner's wharf were permitted to lap over and by virtue of this custom without any express permission and without any express objection upon the part of the owners of the Smith Wharf, then the jury would not be warranted in finding that the property of the petitioner was damaged by the deprivation of the opportunity of permitting vessels to thus lap over."

"14. Upon all the evidence, the jury would not be warranted in finding that the petitioner had acquired any title by prescription in any part of the dock beyond the limits of the land described in his deed."

The judge refused to make the fourteenth ruling requested, and, as is held by the court, covered the subjects of the sixth, tenth and twelfth rulings requested, in so far as they were applicable, by the instructions that are quoted in the opinion.

The language used by the judge in his charge to the jury in illustration of the special and peculiar damage with reference to access to the use of the petitioner's wharf, which is referred to in the opinion, was as follows:

"I think I ought to speak to you a moment about what constitutes special and peculiar damages. . . .

"Suppose you are going along a highway, and I have been foolish enough, as they sometimes do in small country towns, to go out and undertake to do something in the highway; I have not got permission, but have gone out and dug a hole there, and you are going along and you see it and you pass around it, go around. You are bothered. You cannot bring an action against me for

that, because everybody else does that, all the people that have the right to use the highway have that kind of an annoyance. You can go to the grand jury and say something to them and then they will say something to me, but so far as any recovery for any damage such as that, that is not special and peculiar to you. Everybody suffers that as he goes along there. Now you can all see that. Suppose you should go along there tonight and fall into the hole and break your leg; that is a special and peculiar damage, that is to you. The public generally does not suffer that. That illustration serves to show what I mean, the distinction between a special and peculiar damage and the damage that is suffered by the public generally. Apply that to this case, for these rules cover all the cases, they are not made one for one; we do not make one set of rules for one case and another one for another; only we apply them according to the circumstances of the case.

“Wherein has the petitioner suffered special and peculiar damages? He says that before this bridge was constructed, they could bring up vessels there to the wharf two hundred feet long, or less or more, and they could have them brought to the wharf and they could unload and move the vessels fore and aft so as to take the first, second or third hatch, they could go directly to the wharf, it was convenient and accessible. He says all the others can do that now, ‘But I cannot; whereas when the vessels came through, they go to the other wharves, they keep right along, can tie up, move forward and aft just the same as they could before. I cannot. I cannot get to the wharf without going ahead and then backing. In other words, my wharf is not so accessible and I am cut off entirely from this movement fore and aft, and that I have suffered damage that way, and ice collects there in a way that it does not on the other wharves; the ice collects there at a time when I want to use it, and I suffer in that respect a special and peculiar damage.’ And it is for that, among other things, it is something that he does not suffer in common with the others, but it is something that he suffers and the others do not; it is special and peculiar, different in kind from what the others suffer. Now, you may consider that.”

The references to this court in the judge's charge, referred to in the opinion as complained of by the respondent, were as follows:

"I may take a little time with this, gentlemen, but the case will undoubtedly go to the Supreme Court, and inasmuch as I have had between seventy and eighty separate and distinct requests for rulings to give, you see I must treat them as they deserve;" and later in the charge "I do not think we can say that this act of the Legislature is an idle act, that it means nothing, but I think the proper construction of it is — and this will be ultimately for the Supreme Court, I may be mistaken, but we will govern ourselves accordingly here —" [Here followed the judge's statement of the meaning of St. 1903, c. 372, entitled "An Act to authorize the city of Cambridge to construct a bridge across Lechmere Canal in continuation of Commercial Avenue in that city," which was not excepted to].

The jury returned a verdict for the petitioner, and assessed damages in the sum of \$41,065.85. The respondent alleged exceptions to the refusal of the judge to make the rulings requested by it, to certain rulings as to the admission of evidence which are mentioned in the opinion and to certain portions of the charge, including the language of the judge used in illustration as quoted above.

J. F. Aylward, (*F. M. Phelan* with him,) for the respondent.

E. C. Jenney, (*S. Robinson* with him,) for the petitioner.

BRALEY, J. It was held in *Wellington v. Cambridge*, 214 Mass. 35, that while the petitioner had acquired no right by grant to have vessels anchored at his wharf overlap other wharves bordering on the canal, there was evidence that such right had been gained by prescription. The evidence at the second trial, that for at least twenty-eight years the forward hatches of vessels while unloading coal would overlap the adjoining wharf by more than two thirds of their length, was sufficient to warrant the jury in finding the acquisition of an easement by prescription which did not interfere with any right of the public in navigable waters. *Tufts v. Charlestown*, 117 Mass. 401. *Commercial Wharf Co. v. Winsor*, 146 Mass. 559, 562. *Wellington v. Cambridge*, *supra*. The respondent's fourteenth request accordingly could not be given, and the sixth, tenth and twelfth requests in so far as applicable, were covered by the clear, full and accurate instructions, that "if you find that his predecessors in title and he, either jointly or separately, gained this right to overlay by an uninterrupted, open, continuous, adverse use under a claim of right, ac-

quiesced in by the other side, and that it was for twenty years or more, that is sufficient and it is as good as if a deed had been passed giving it to him, and the burden is upon the plaintiff to establish this by a fair preponderance of the evidence." *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396. *Wishart v. McKnight*, 178 Mass. 356. *Graves v. Broughton*, 185 Mass. 174, 176, 177.

The failure to give the respondent's remaining requests as formulated not having been argued, they are to be treated as waived, and the other exceptions to the instructions as saved and argued are confined to the language used by way of illustration in defining the damages suffered by the petitioner arising from the restricted access to the wharf caused by the piling and the northerly abutment of the bridge resting upon land formerly covered by a portion of the wharf and the bed of that part of the canal in which he owned the fee. R. L. c. 48, § 16. St. 1903, c. 372. The jury on abundant evidence could find, that, while vessels at other wharves could be docked and so moved fore and aft as to permit the cargo to be discharged from the first, second or even the third hatch, the petitioner's wharf had been rendered so inaccessible as to prevent this mode of unloading which he previously had been able to use. It was for the jury to determine the extent of this depreciation, and to assess the damages. *Bailey v. Boston & Providence Railroad*, 182 Mass. 537, 540. *Sheehan v. Fall River*, 187 Mass. 356, 361. *Cornell-Andrews Smelting Co. v. Boston & Providence Railroad*, 202 Mass. 585, 598, 599.

A judge in charging the jury may use illustrations to enable them more fully to understand and apply the law governing the case as given from the bench. *Commonwealth v. Johnson*, 188 Mass. 382, 387. The illustration was apposite, and the language used in defining such damages as distinguished from damages suffered in common with other landowners is not susceptible to the respondent's criticism that the judge showed that he was biased, but was impartial and unexceptionable.

The reference to this court, of which the respondent complains, did not, when read with the context, exceed the discretionary powers of the judge as to the mode in which the attention of jurors shall be directed to the importance of the questions presented. It is apparent that no rule of law was stated incorrectly, nor the attention of the jury turned aside from the issues which

they were to determine. *Whitney v. Wellesley & Boston Street Railway*, 197 Mass. 495, and cases cited.

Nor is there reversible error in the admission of evidence as to the estimated annual cost of trimming coal between the forward and middle hatches to the rear hatch of the barges before they could be unloaded, or that because of the loss of time thus caused the petitioner also would lose the premium paid by the transportation companies for the speedy discharge of cargoes. The jury were to consider any and all uses to which the property could be appropriated profitably, and whether any use to which it could be put was too indefinite and prospective is largely within the discretion of the presiding judge. *Maynard v. Northampton*, 157 Mass. 218, 219.

It was held in *Pegler v. Hyde Park*, 176 Mass. 101, that evidence of the value of plants, flowers and the prepared soil used for greenhouses, and the amount of business transacted, was admissible. And where land with gravel beds was taken, evidence of not only the value of the unexcavated gravel but the cost of transportation, as well as of the market conditions of its supply and demand as merchandise, was said to be admissible in the discretion of the court. *Providence & Worcester Railroad v. Worcester*, 155 Mass. 35, 41. While loss of business or of good will in the absence of a statute so providing is not an element in the assessment of damages for the taking of property by right of eminent domain, the jury, when the evidence was introduced and later in the charge, were cautioned and instructed that the evidence was to be considered not as showing injury to the petitioner's business, but solely upon the question of the capacity of his property for the uses for which it was adapted and used at the date of the taking and as affecting its value for future use or improvement. *Chase v. Worcester*, 108 Mass. 60. *Bailey v. Boston & Providence Railroad*, 182 Mass. 537. *Whiting v. Commonwealth*, 196 Mass. 468. It was one way of showing the diminution in value of the property and for this purpose the evidence as limited was admitted properly. *Drury v. Midland Railroad*, 127 Mass. 571, 582.

The petitioner's appeal is dismissed and the respondent's exceptions are overruled.

So ordered.

GEORGE L. FICKETT & others vs. BOSTON FIREMEN'S RELIEF FUND.

Suffolk. January 19, 1915. — February 26, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Boston. Boston Firemen's Relief Fund. Municipal Corporations, Fire department. Statute, Construction. Words, "Fire department."

Under St. 1880, c. 107, as amended by St. 1881, c. 22, St. 1909, c. 308, St. 1911, c. 134, and St. 1913, c. 168, creating and relating to the Boston Firemen's Relief Fund, a corporation, which is authorized to hold moneys and real and personal estate not exceeding in the aggregate \$400,000 "for the benefit of members of the Boston fire department and members of the Boston protective department or their families requiring assistance, or for the benefit of any persons, or the families of any persons, who have been such members, and who require assistance," the members of the branch of the Boston fire department known as the "fire alarm operating branch" are entitled to membership and to share in the benefits of the fund, being included in the designation "members of the Boston fire department" as used in the statutes named above.

Where in passing upon the meaning of a statute a fair consideration of the conditions attending its passage indicates clearly that a literal interpretation would defeat the purpose of the statute, the spirit rather than the letter of the statute is to be followed in its construction.

PETITION, filed on November 7, 1913, by alleged members of the Boston fire department engaged in the performance of the duties assigned to the branch of the department known as the fire alarm operating branch, for a writ of mandamus addressed to the Boston Firemen's Relief Fund, a corporation, alleging that by virtue of their membership and service in the Boston fire department they were entitled, under the provisions of certain statutes which are named in the opinion, to share in the benefits of the fund held by the respondent, but that at an annual meeting of the members of the respondent they had been refused recognition as members; and praying that the respondent might be commanded to restore the petitioners to the full exercise and enjoyment of all the rights and privileges of members of the respondent.

The case was referred to an auditor to hear the parties and their evidence, to find the facts and report them to the court. After

the filing of the auditor's report the case came on to be heard before *Pierce, J.*, upon the pleadings, the auditor's report and an agreed statement of facts, and, at the request of the parties, the justice reserved the case for determination by the full court.

M. L. Jennings, for the petitioners.

R. Homans, for the respondent.

BRALEY, J. The St. of 1880, c. 107, as amended by St. of 1881, c. 22, St. 1909, c. 308, St. 1911, c. 134, St. 1913, c. 168, created the respondent corporation for the purpose of receiving and holding moneys and real and personal estate not exceeding in the aggregate \$400,000 for the benefit of the members of the fire department of the city of Boston, and members of the Boston protective department or their families requiring assistance, or for the benefit of any persons or the families of any persons who have been such members and who require assistance. While conceding that the petitioners are employed in the "branch of the department known as the fire alarm operating branch," the respondent contends they are not within the purview of the statute, and has refused them recognition as members with the right to participate in its benefits.

To determine the question, it is necessary to ascertain how the fire department is organized, its powers administered, and its duties performed. The report of the auditor with the agreed statement of facts are to be treated as all the evidence the parties cared to introduce. It is largely upon the auditor's findings that the scope of the original statute, with the amendatory acts, must be construed, under the familiar rule that a fair consideration of the surrounding conditions may indicate clearly that a literal interpretation is not to control, if thereby the scope and purpose of the statute is defeated. The designation in St. of 1880, c. 107, § 4, of the property held by the respondent as the "Boston Firemen's Relief Fund," is not conclusive, but is to be read with the other provisions. The spirit of the law, not the letter, gives it life.

The fire alarm department was a separate department until the passage of the ordinance to establish a consolidated fire department, which provided for a board of three commissioners, a fire engineer, a superintendent of fire alarms, assistant engineers, enginemen, telegraph operators and other members whose maxi-

num number was fixed. The ordinance, which has remained substantially unchanged, was in force when St. of 1880, c. 107, and the St. of 1881, c. 22, were enacted. The fire department as thus organized consisted of men in the "fire fighting force," and of men in the fire alarm department, charged with supervision of the fire alarm system. The names of the petitioners who have been duly appointed appear on the membership roll book of the department in accordance with the ordinance, although they were engaged in the fire alarm branch. And it is not disputed that they are subject at all times to the orders of their superior officers, while some of them are obliged to respond to the second alarm, even if their regular duties require them to maintain the electrical apparatus in efficient working condition. It further appears that under orders from the chief of the department the petitioners can order fire companies from one station to another, or to a fire, and may if the fire alarm system fails to work properly request any company commander to detail men of the "fire fighting force" to assist in remedying the defect.

But further recapitulation is unnecessary. It is manifest that the fire department of the city as to all its members is under the control of one responsible head or board. It was intended to be and is a single department made up of officers and employees whose services even if diversified are for the sole purpose of safeguarding property within the municipality from loss or damage by fire, and the rules and regulations for the maintenance of discipline, with the penalties for their violation, and the method of enforcement, are made applicable to every member without any distinction as to the particular service he performs. The ordinary daily work of the petitioners may not expose them to the hazards encountered by members who attend fires as the "fire fighting force," but none the less their services are shown to be equally indispensable. The statute as previously said must be read in connection with the subject of legislation, and when so read "members of the Boston fire department" as used in the act are not to be restricted to those who combat the flames, or endeavor by protective measures to preserve property, but include the petitioners without whose aid fires could not be effectually controlled and extinguished in the mode provided by a carefully coördinated system.

The exclusion of the petitioners having been unjustifiable, a writ of mandamus is to issue to restore them to all the rights and privileges to which by virtue of their membership they are entitled.

So ordered.

MARY A. FORD *vs.* JOHN W. FORD & others.

Suffolk. January 20, 1915. — February 26, 1915.

Present: RUGG, C. J., BRALEY, CROSBY, & PIERCE, JJ.

Devise and Legacy. Trust, Termination. Words, "Revert."

A testator, who left a widow and one daughter, gave by his will to his widow and to his daughter each one half of the income of all his property "during their joint lives," and, after the death of either, the whole of the income to the survivor, unless before the death of his widow his daughter should die leaving issue, in which event the issue of the daughter was to have her half of the income, "and upon the death of both my said wife and daughter said real, personal or mixed estate shall revert to my next of kin, the persons would have been rightfully entitled to the same had I died intestate." *Held*, that the testator's widow and daughter were his next of kin as defined in this clause and each took at the death of the testator a vested remainder in the property, subject to the life estates, that, upon the death of the widow intestate, the daughter inherited her mother's vested interest and became the absolute owner of the entire estate, and that consequently in a suit in equity she was entitled to a decree declaring the trust to have been terminated and ordering the trustee to transfer and convey the entire property to her. *Held*, also, that the use of the word "revert" did not affect the testator's gift of the vested remainders to those who would have inherited his estate had he died intestate.

BILL IN EQUITY, filed on January 17, 1914, in the Probate Court for the county of Suffolk, by Mary A. Ford, the daughter and only child of Patrick W. Ford, late of Boston, who died on August 11, 1900, leaving a will containing the provisions quoted and described in the opinion, alleging that the plaintiff's mother, who was the widow of Patrick W. Ford, died on May 11, 1913, and praying for a decree terminating the trust created by the will of Patrick W. Ford and ordering the defendant George A. Gray, the trustee under that will, to transfer and convey to the plaintiff all the property in his possession and control as such trustee free and discharged of all trusts, those persons also being made

defendants who would have been the next of kin of Patrick W. Ford if he had died intestate without leaving a wife and child.

The Probate Court made a decree for the plaintiff. On appeal to the Supreme Judicial Court the case was heard by *Loring, J.*, who made an order for a decree which concluded as follows: "I am of opinion, therefore, that the mother and daughter had a vested remainder in the property in which the testator had created the life estates to which I have already referred. It being agreed that the mother died intestate, the remainder which the mother had (subject to the life estates) vested in the daughter, and the daughter is now entitled to a conveyance of the *corpus* of the fund." By order of the justice a final decree was entered affirming the decree of the Probate Court with costs. Two of the persons named as defendants appealed.

The case was submitted on briefs.

J. W. McAnarney & W. H. Travers, for the defendants.

S. E. Duffin, for the plaintiff.

CROSBY, J. The testator by the third clause of his will provided as follows: "All my estate whether real personal or mixed, and wherever the same may be situated I give, devise and bequeath to my wife Elizabeth A. Ford and my daughter Mary A. Ford, of the County and State aforesaid, duly during their joint lives, in equal shares, and after the death of either of them the survivor to become sole legatee unless my daughter should die first leaving issue, in which event if my wife be still living one half of the income of said property shall be paid to her during her life and the other half to the issue of my said daughter in equal shares and upon the death of both my said wife and daughter said real, personal or mixed estate shall revert to my next of kin, the persons would have been rightfully entitled to the same had I died intestate."

Under this clause of the will, the testator first gave a life estate to his widow and to his daughter during their joint lives, and after the death of either the survivor was to take the whole of the income unless before the death of the mother the daughter died leaving issue, in which event the issue of the daughter was to have the income to which their mother would have been entitled during her lifetime.

So far this provision of the will relates only to income. The

testator then provided: "And upon the death of both my said wife and daughter said real, personal or mixed estate shall revert to my next of kin, the persons [who] would have been rightfully entitled to the same had I died intestate."

Having disposed of the income in the manner provided in the will, he gave the principal of the estate to his next of kin, that is, to those persons who would have inherited his estate had he died intestate.

Under the decisions of this court it is well settled that heirs or next of kin are to be ascertained as of the time of the testator's decease, unless a different intent is plainly manifested by the will. *Welch v. Blanchard*, 208 Mass. 523.

The mother and daughter had a vested remainder in the property in which the testator had created the life estates. The use of the word "revert" does not affect the validity of the gift to those persons who would have inherited at the death of the testator if he had died intestate.

It follows that upon the death of the testator's widow the trust was terminated, and as she died intestate the one half interest in the remainder which she took (subject to the life estates) became vested in the daughter, who upon her mother's death became the absolute owner of the entire estate and she is now entitled to have it transferred and conveyed to her. *Bassett v. Nickerson*, 184 Mass. 169.

Accordingly the decree of the single justice must be affirmed.
So ordered.

ISAAC FREEDMAN vs. HARRIS B. GORDON.

Suffolk. January 21, 1915. — February 26, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Frauds, Statute of. Landlord and Tenant. Evidence, Relevancy.

If a landowner makes a contract in writing with a prospective tenant to build a wooden house which the prospective tenant agrees to occupy for a term of five years at a rent of \$100 a month, and later the parties modify this contract by

an oral agreement by which the landowner agrees to build the house of brick instead of wood and the prospective tenant agrees to pay \$500 additional in rent, and if thereafter the house is built of brick and the tenant enters it and lives there for ten months but refuses to pay the additional rent, when he is sued for the rent by the landowner the statute of frauds is no defence to the action; because when the tenant took possession of the premises under the contract in writing as modified by the oral agreement he became a tenant at will by virtue of R. L. c. 127, § 3, and the agreement ceased to be one not to be performed within one year under R. L. c. 74, § 1, cl. 5.

In the action described above the agreement in writing is admissible in evidence as one of the steps by which the defendant's liability to the plaintiff is established. In the action described above it was not necessary to decide whether the plaintiff could recover the additional rent under the doctrine of substituted performance put forward in *Cummings v. Arnold*, 3 Met. 486.

LORING, J. The plaintiff and the defendant entered into a written agreement by which the plaintiff agreed to erect a wooden building to be occupied by the defendant as his tenant for a term of five years, at a rent of \$100 a month. While the building was in process of erection the defendant asked the plaintiff to construct it of brick in place of wood. By word of mouth the plaintiff agreed to do this on the defendant's agreeing to pay an additional rent at the rate of \$500 a year. The building thereafter was constructed of brick. The defendant entered into occupation of it, but refused to pay the additional rent agreed upon by word of mouth. This action was brought to recover the additional rent so agreed upon, for a period of ten months next after the defendant went into occupation. The defendant set up in defence that the contract sued on was one not to be performed within a year, within cl. 5 of R. L. c. 74, § 1 (which is in substance the same as § 4 of the original statute of frauds, 29 Car. II. c. 3), and asked the judge to give the three rulings set forth in the footnote.* This the judge † refused to do, and the defendant

* "1. If, after the original agreement was made, a new oral agreement was made by which the defendant was to occupy the premises for five years, or more, such oral agreement can not be enforced because it is not in writing, and the verdict must be for the defendant.

"2. The subsequent oral agreement is invalid because it is not in writing and does not affect or operate to modify the original agreement.

"3. On all the evidence the verdict must be for the defendant."

† *Hitchcock*, J., who submitted the case to the jury. They returned a verdict for the plaintiff in the sum of \$435.62; and the defendant alleged exceptions as stated in the opinion.

took an exception. He also excepted to the admission in evidence of the original written agreement and lease.

Apart from the doctrine of substituted performance put forward in *Cummings v. Arnold*, 3 Met. 486, these exceptions must be overruled. It was competent for the parties, by the subsequent oral agreement, to modify, change or annul the written agreement. *King v. Faist*, 161 Mass. 449, 456, and cases there cited. If the defendant had refused to enter into possession of the brick building when it was completed (apart from the doctrine of *Cummings v. Arnold*), the statute of frauds would have been a defence. *Whits v. Wieland*, 109 Mass. 291, 292. *Miles v. Janvrin*, 200 Mass. 514, 517. *Flanagan v. Welch*, *ante*, 186. But, when the defendant entered into possession under the written contract modified by the subsequent oral agreement he became a tenant at will by force of R. L. c. 127, § 3, which is in substance the same as § 1 of the original statute of frauds (29 Car. II. c. 3), although enacted here by an early Colonial statute. See Col. Laws, 32; *Ellis v. Paige*, 1 Pick. 43; *Kelly v. Waite*, 12 Met. 300. By force of that act the written contract modified by the subsequent oral agreement became a tenancy at will and ceased to be a contract not to be performed within one year from the making thereof within R. L. c. 74, § 1, cl. 5. In case a tenant enters under an oral agreement and becomes a tenant at will, the terms of the oral agreement of lease are binding upon the parties and will be enforced by the court. See in this connection *Miles v. Janvrin*, 200 Mass. 514, 518; *Flanagan v. Welch*, *ante*, 186.

The written agreement was admissible in evidence as one of the steps which made out the defendant's liability to the plaintiff in this case.

The result is the same if the doctrine of substituted performance put forward in *Cummings v. Arnold*, *ubi supra*, applies to the subsequent agreement in the case at bar and enables the plaintiff to recover the increase in the rent thereby stipulated for. As to that doctrine see *Rockwood v. Walcott*, 3 Allen, 458; *Lerned v. Wannemacher*, 9 Allen, 412; *Whittier v. Dana*, 10 Allen, 326; *Hurlburt v. Fitzpatrick*, 176 Mass. 287; *Weissner v. Ayer*, 176 Mass. 425, 428; Browne, St. of Frauds, §§ 409-428; Williston on Sales, § 121; Langdell Select Cases on Sales, 1033, 1034.

It is not necessary to decide upon the right of the plaintiff to recover under that doctrine.

The entry must be

Exceptions overruled.

The case was submitted on briefs.

S. Sigilman, for the defendant.

D. Stoneman, A. I. Stoneman & A. G. Gould, for the plaintiff.

MARY H. DOYLE vs. SINGER SEWING MACHINE COMPANY.

Suffolk. January 22, 1915. — February 26, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Evidence, X-ray photographs. *Negligence*, Of one repairing sewing machine.
Practice, *Civil*, *Exceptions*.

X-ray negatives, if properly taken by a person duly qualified, may be admitted in evidence in an action of tort for personal injuries to show the condition of the bones of the plaintiff's nose which are alleged to have been injured through the carelessness of an agent of the defendant.

In an action by a girl against a dealer in sewing machines for personal injuries sustained from being struck on the head and nose by the cover of a sewing machine hired by the plaintiff's mother from the defendant by reason of the negligent manner in which an agent of the defendant who had been sent to repair the machine raised its cover, where there was evidence that, when the plaintiff in full view of the defendant's agent had stooped to pick up some "sewing" that the defendant's agent had brushed off the table of the machine and was getting up again, she was hit between her eyes and the bridge of her nose by the cover of the machine which the defendant's agent was opening, it was held, that the questions of the plaintiff's due care and of the negligence of the defendant's agent were for the jury.

At the trial of an action of tort for personal injuries, where the presiding judge at first refused to instruct the jury, as requested by the defendant, that there was no evidence that the bridge of the plaintiff's nose was broken, and said that, although he did not remember that any doctor had testified that there was such a fracture, he would leave it to the recollection of the jury as to whether there was such evidence, and where afterwards, upon an exception being taken to this refusal, the judge said that he would give the instruction to the jury and gave it in the form requested, the defendant has no ground for exception, the judge having corrected any error he may have made in his earlier refusal to give the instruction.

If in the case above stated the defendant's counsel thought that the judge had failed to place on the instruction the emphasis which it deserved in view of its importance in relation to the assessment of damages or otherwise, he should

have directed the attention of the judge and the plaintiff to such lack of emphasis, and, not having done so, he has no grievance.

TORT, against a corporation engaged in the business of manufacturing, selling and leasing sewing machines, for personal injuries sustained by the plaintiff on February 1, 1907, when she was about nineteen years old, from being struck on the head and nose by the cover of a sewing machine belonging to the defendant and leased by it to the plaintiff's mother owing to the negligence of an agent of the defendant who had been sent to the residence of the plaintiff's mother to repair the machine. Writ dated April 4, 1910.

In the Superior Court the case last was tried before *White, J.* The evidence is described in the opinion. Certain X-ray photographic plates, which are referred to in the opinion, were offered in evidence by the plaintiff to show the condition of the injured part of the plaintiff's nose on May 22, 1914, which was a few days before the last trial. They were admitted by the judge subject to the defendant's exception.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. Upon the evidence the plaintiff cannot recover.

"2. If the plaintiff believed or had reasonable cause to believe that she had a claim against the defendant to recover damages for personal injuries, and without any good reason failed to make known her said claim to the defendant and take any steps to enforce payment of the same, for over two years, then such failure on the plaintiff's part to make known and enforce her said claim may be considered by the jury as bearing upon the validity of her alleged claim and her good faith in thereafter asserting it.

"3. The plaintiff was bound to use reasonable care to prevent injury or damage to her person, and if any injury which she may have received is attributable to herself in part, she cannot recover, although the defendant or its agent may have been negligent also.

"4. The defendant's agent, Bere, had a right to assume that the plaintiff would use reasonable care and vigilance to avoid being hurt, and if Bere was doing the work upon which he was engaged in the usual manner in which such work is ordinarily done, and had no notice or warning that the plaintiff was approaching the machine in such a way as to expose herself to danger by

coming in contact with it, then any omission on his part to anticipate that the plaintiff was exposing herself to danger would not be negligence on his part.

"5. In weighing evidence it is a safe rule for the jury first to consider to what extent such evidence is consistent with facts which are admitted or clearly proven in the opinion of the jury. The jury would be warranted in considering evidence which is inconsistent with admitted or clearly established facts as of less weight and as less worthy of credit than evidence which is consistent with such facts. And evidence which is equally consistent with two opposing claims is insufficient to prove either claim, and should be disregarded by you.

"6. There is no evidence in this case that the plaintiff had the bridge or septum of her nose broken. I instruct you that the plaintiff's statement that some doctor at the Massachusetts Homeopathic Hospital who has not been called told her her nose was fractured cannot be considered by you.

"7. I instruct you that there is not sufficient evidence in this case to justify you in finding that the plaintiff's septum was bent as a result of a blow or external violence."

The judge refused to make the rulings numbered one and seven, and dealt with the other rulings, especially with the ruling numbered six, in the manner described in the opinion. He submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$4,750. The defendant alleged exceptions.

A. M. Lyman, for the defendant.

F. J. Daggett, (*J. T. Cassidy* with him,) for the plaintiff.

PIERCE, J. The radiograph, if properly admitted, tended to prove to the jury the existence of certain physical defects in and about the bony structure in the front of the plaintiff's head, around the eyes and upper part of the nose.

The evidence was relevant to the issue before the jury. *Buck v. McKeesport*, 223 Penn. St. 211. The radiograph was taken by Dr. Liebman, who testified that he was a clinical assistant at the Massachusetts Charitable Eye and Ear Infirmary; that he had been connected therewith since 1910, and had charge of the X-ray department; that he took four negatives of the plaintiff's head; that they were correct representations of the condition of the bones in the front of the plaintiff's face and of the sinus as it

was on May 22, 1914. The judge admitted the evidence of the negatives, and the defendant duly excepted.

The record does not show that the defendant questioned the qualifications of Dr. Liebman to take the radiographs, or so much as asserted to the judge that the position of the negative with reference to the camera was improper, unfair or fraudulent.

Nor is there anything to indicate that the judge's preliminary ruling was biased or not governed by rules of law. The evidence was properly admitted and the exception must be overruled. *De Forge v. New York, New Haven, & Hartford Railroad*, 178 Mass. 59.

With the admission of the negatives, the jury might find that the plaintiff's mother had a sewing machine in her house which needed some adjustment; that the mother wrote to the defendant about it; that in response the defendant sent its servant, Bere, to the mother's house to repair the belt; that upon arriving Bere went to the machine, which was so connected to its frame as to permit of its being lowered below the level of the table of the frame when it was not in use; that when once lowered, in order to bring it to a position of use, it was necessary to lift and turn back a hinged cover of wood; that as Bere stood by the side of the machine there was some "sewing" on the machine table; that the mother told the plaintiff to take it off; that Bere brushed it off and it fell to the floor; that the plaintiff came to the machine; that as she came she faced Bere, who stood on the opposite side of the machine; that she stooped to take the sewing from the floor; that Bere knew of her position; that he lifted the cover at such a time and in such a manner that the plaintiff, as she arose, would be likely either to hit or be hit by it; that she did not know he was about to open the cover; that as she arose she was hit by it between the eyes and the bridge of the nose; that the next day her face was black across the eyes and the nose, and her eyes were bloodshot; that thereafter there was a certain cloudiness and depression in the right frontal sinus and a small opening running from the right frontal sinus forward through the bone; and that as a result of the blow the septum was deviated and bent abnormally.

Upon these facts the jury might have found that the defendant's agent was negligent and that the plaintiff was in the exercise of

due care. The judge could not have ruled properly that "upon the evidence the plaintiff cannot recover," or that there was not sufficient evidence to justify a finding "that the plaintiff's septum was bent as a result of a blow or external violence." The exceptions to the refusal to give rulings numbered 1 and 7 are overruled.

In its sixth request the defendant asked the presiding judge to rule as follows: "There is no evidence in this case that the plaintiff had the bridge or septum of her nose broken. I instruct you that Miss Doyle's statement that some doctor at the Massachusetts Homeopathic Hospital who has not been called told her her nose was fractured cannot be considered by you." In his charge the judge first treated the question of a broken bridge or septum as a question of fact to be left to the determination of the jury. He explained at some length the several contentions in that regard. He stated that to his recollection no doctor had testified that there was a fracture, but added that their recollection, not his, was to govern. At the close of his charge he refused to give this and other rulings asked for, in form or substance; but the defendant's counsel having excepted to such refusal he finally stated that "he was going to give all of the defendant's requests." Of these requests he did not give those numbered one and seven. The others were given as asked for and in the form presented. The method adopted was to take up each request in its numbered order, and to read, explain and comment upon it. When the judge came to the ruling numbered six, he read it and made no comment on so much of it as related to the bridge or septum, but at once proceeded to discuss the remaining portion of that request, which, given in the form presented by the defendant, corrected anything inconsistent in the earlier part of the charge. *Hunt v. Boston Terminal Co.* 212 Mass. 99. *Todd v. Boston Elevated Railway*, 208 Mass. 505.

If the counsel for the defendant felt that the judge had failed to place the emphasis on this request that it fairly deserved in view of its importance in the matter of the assessment of damages, or otherwise, it was his duty to direct the judge's and the plaintiff's attention to this cause of complaint. Failing to do this he has no legal grievance. *McCart v. Squire*, 150 Mass. 484. This exception must be overruled.

Exceptions overruled.

BENJAMIN F. STEVENS vs. ISAAC REYN.

Suffolk. January 22, 1915. — February 26, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Negligence, In use of wagon.

If, at the trial of an action for personal injuries, there is evidence that the defendant, while trying to back a horse attached to a wagon, asked the plaintiff to help him, that the plaintiff in response to such request took hold of the spokes of the rear wheel and helped to move the wagon back, and that the defendant, although he saw the position of the plaintiff's hands, without warning to the plaintiff then caused the horse to move forward, reversing the wheel and crushing one of the plaintiff's hands, the jury are warranted in finding that the plaintiff was in the exercise of due care and that the defendant was negligent.

PIERCE, J. The jury could find that while the defendant was trying to have a horse back a wagon he asked the assistance of the plaintiff; that the plaintiff in response to the request took hold of the spokes of the rear wheel on the right hand side of the wagon; that the wagon was backed somewhat with the plaintiff's aid; that the defendant saw the position of the plaintiff's hands; that without warning he caused the horse to move forward; and that as a consequence the wheel was reversed and the plaintiff's hand was crushed between the wheel and the side of the wagon.

"Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." Per Brett, M. R., in *Heaven v. Pender*, 11 Q. B. D. 503, 509.

The jury could find that the defendant failed to exercise toward the plaintiff that care which the law required of him under the circumstances, and that the plaintiff was not himself negligent.

The judge* was right in refusing to rule that the plaintiff

* *Hitchcock, J.*

could not recover, and in declining to direct a verdict for the defendant.

Exceptions overruled.

D. Flower, for the defendant, submitted a brief.

J. H. Duffy, for the plaintiff.

GEORGE NICKERSON, JR., vs. EDWARD GLINES & others.

Suffolk. November 9, 1914. — February 27, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Practice, Civil, Specifications, Nonsuit, Exceptions, Appeal. *Pleading, Civil*, Specifications. *Conspiracy. Rules of Court.*

The ordering of particulars and specifications as to allegations in pleadings rests in the judicial discretion of the trial court and is not subject to review by this court unless there appears to have been an abuse of discretion.

A finding of fact by a judge as a basis of an order that the plaintiff shall file specifications as to certain allegations in his declaration cannot be reviewed on exceptions where it appears that the finding was made in part in reliance upon statements of counsel which are not reported.

Where it appears that the allegations of a declaration in an action of tort for damages due to fraud alleged to have been perpetrated by a number of defendants through a conspiracy are vague and indefinite, that some of the defendants filed motions for specifications as to such allegations, that before the hearing of such motions such defendants had been examined fully on the questions as to which specifications were asked at a hearing of a suit in equity by the same plaintiff against others of the defendants, that the judge after a hearing on the motion ordered the specifications asked for to be filed, that the plaintiff filed irresponsive and insufficient specifications, that on motion of the defendants the judge under Rule 6 of the Superior Court ordered the plaintiff to comply with the previous order for specifications or to submit to a nonsuit, and that the plaintiff declined to file such specifications and stated in open court that he did not desire further time or opportunity for filing further specifications, it is a proper exercise of discretion for the judge to order the plaintiff nonsuited.

The proper way to bring before this court the question, whether an order of a judge of the Superior Court nonsuiting a plaintiff for failure to obey a previous order directing him to file specifications to allegations in his declaration, was an abuse of judicial discretion, is by a bill of exceptions and not by an appeal.

RUGG, C. J. This is an action of tort wherein the plaintiff alleges that the defendants, through a conspiracy, defrauded him out of large sums of money. Upon motion of the defendants

Glines, Burrage and Rich, the plaintiff was ordered to file detailed specifications of the acts and misrepresentations relied on. Before making this order, the judge* was informed that a bill in equity brought by the plaintiff through his present counsel against the defendants other than Glines, Burrage and Rich, had been referred to a master, before whom the taking of evidence stenographically reported had consumed many days and had been completed, and the defendants Glines and Burrage both had testified. Thereupon, the plaintiff filed a paper entitled bill of particulars, which contained some allegations in addition to those of his declaration. These defendants then moved that these specifications be stricken from the files as irresponsive and irrelevant, and that new and sufficient specifications in accordance with the previous order of the court be filed within a time to be limited, and that, in default thereof, a nonsuit be entered against the plaintiff. Upon hearing this motion, the judge ordered that the specifications required by the earlier order be filed on or before a certain date, and that, if that order was not complied with, the plaintiff should be nonsuited. A statement then was filed by the plaintiff in substance to the effect that he was unable to give further details respecting the tortious acts of these defendants. Thereupon, the defendants moved for a nonsuit. At the hearing upon this motion, the judge found from the face of the record and also from the statements of counsel made at the various hearings that the particulars filed were not ample in form. Then an order was entered, setting forth the finding that there had not been a compliance with the orders for specifications and the fact that the defendant [obviously a mistake or misprint for plaintiff] in open court had declined further opportunity to file additional specifications, and nonsuiting the plaintiff as to these three defendants for failure to comply with the previous orders for filing of specifications.

It has been said many times that the power to order particulars or specifications rests in the discretion of the trial court. *Gardner v. Gardner*, 2 Gray, 434. *Blake v. Everett*, 1 Allen, 248, 251. *Commonwealth v. Wood*, 4 Gray, 11, 13. *Harrington v. Harrington*, 107 Mass. 329, 334. *Hines v. Stanley G. I. Electric Manuf. Co.* 199 Mass. 522, 527. *Commonwealth v. King*, 202 Mass. 379, 384. It is

* Jenney, J.

the general rule that matters which rest in the judicial discretion of the trial court cannot be reviewed by this court. That question most frequently arises upon motions for new trials or to set aside verdicts. But the same principle applies broadly to discretionary rulings. It finds illustrations in orders as to filing further answers to interrogatories, the allowance of amendinents, the time of introduction of evidence, allowance of leading questions, continuances, requiring election between counts, and refusal to charge upon indecisive parts of evidence or in the phrase of a request if the substance is given. It is, however, a sound judicial and not an arbitrary discretion which must be exercised. *Simmons v. Fish*, 210 Mass. 563, 572. Abuse of discretion as to specifications becomes error of law and is subject to revision. *Powers v. Bergman*, 197 Mass. 39.

There is nothing in the case at bar to indicate that the Superior Court was not acting well within its powers. It would be enough to dispose of the case to say that the finding, that the specifications filed were not a compliance with the order, was based in part upon statements of counsel apparently made and accepted as facts, which are not set out in the exceptions. A finding of fact grounded on unreported evidence must stand. *Bailey v. Marden*, 193 Mass. 277.

But, apart from this consideration, no error is shown. It appears that the plaintiff had examined several of these defendants in a hearing touching matters kindred to those involved in the present action. He was in a position to know what the facts were upon which an action for conspiracy could rest if they existed at all. His failure under these circumstances to be definite in the statement of his cause of action in pleadings stood upon a somewhat different ground than it would if he were wholly in the dark as to the subject.

It is not necessary to decide whether the allegations of the declaration as amplified by the bill of particulars filed would have been demurrable. They were in the most general terms and were vague and indefinite as to facts. They failed to furnish much information as to salient features of participation by these three defendants in a conspiracy to defraud. The defendants would be largely unenlightened as to the kind of evidence they must be prepared to meet. It was well within the power of the trial court

to order further and more pointed statement of details under all the circumstances here disclosed.

When the plaintiff declined to comply with the direction of the court, and stated that he did not desire further time, it was the duty of the court to proceed further. If the court does not possess the power to enforce its just order of this nature, it would be impotent in the face of a recalcitrant party. The making of an order without authority to enforce it would be a vain ceremony. The entry of a nonsuit is the appropriate means of dealing with a refusal to comply with such an order as this. *Babcock v. Thompson*, 3 Pick. 446, 449. *Stern v. Filene*, 14 Allen, 9. *Harding v. Morrill*, 136 Mass. 291. *Fels v. Raymond*, 139 Mass. 98. It was in accordance with Rule 6 of the Superior Court. See R. L. c. 173, § 68.

The proper way to bring before this court the questions here sought to be reviewed was by exceptions and not by appeal.

Appeal dismissed.

Exceptions overruled.

H. N. Allin, for the plaintiff.

E. A. Whitman, for the defendant.

KARL I. TORNROOS vs. R. H. WHITE COMPANY.

SAME vs. AUTOCAR COMPANY.

KATHERINE A. TORNROOS vs. R. H. WHITE COMPANY.

SAME vs. AUTOCAR COMPANY.

Suffolk. November 10, 1914. — February 27, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Agency, Existence of relation. Negligence, In use of automobile. Practice, Civil, Exceptions. Parent and Child. Husband and Wife.

A corporation which was a manufacturer of automobiles sold to a corporation which was the proprietor of a department store in a city a number of automobile trucks and agreed in writing to furnish with each truck without cost for seven days a chauffeur who was a skilled mechanic and who would instruct the store corporation's men, and to "garage" the trucks for twelve months. During the

seven days the chauffeurs took the trucks from the automobile corporation's garage to the stable of the store corporation where one of that corporation's men got into each truck which thereafter was used in the delivery of goods of the store corporation during the day, the employees of the store corporation giving directions as to the streets and houses to which the trucks should be driven and the speed and manner of the driving being wholly within the control of the chauffeurs. At the close of the day the store corporation's employees were left by the chauffeurs at its stables and the trucks then were driven by the chauffeurs to the garage of the automobile corporation. In the morning of a day in the seven day period, when one of the trucks was being driven from the automobile corporation's garage to the stable of the store corporation and when only the chauffeur was upon it, a traveller upon the highway was injured through negligence of the chauffeur and brought separate actions against the corporations to recover for personal injuries. *Held*, that in the particular business in which he was engaged at the time of his negligence the chauffeur was the servant of the automobile corporation and not of the store corporation and, therefore, that a verdict should be ordered for the defendant in the action against the store corporation and that a verdict for the plaintiff was warranted in the action against the automobile corporation.

If, at the trial together of two actions, one against a merchant and the other against a dealer in automobiles for personal injuries caused by the plaintiff being run over by an automobile sold by the dealer to the merchant, a contract in writing which included the terms of sale of the automobile and an agreement as to its operation for a certain period by a chauffeur of the dealer becomes determinative of the question, whose servant the chauffeur was at the time of the accident, and if there is admitted in evidence a bill receipted by the dealer which after the accident had been presented by the dealer to the merchant and paid by him and which contained the statement, "Cars operated by our employees only at owner's risk," and if the trial judge subject to an exception by the dealer instructs the jury that this receipt was not part of the contract of sale, it is immaterial whether an interpretation by the judge of the above quoted language of the receipted bill, to the effect that it meant merely that the dealer assumed no responsibility to the merchant for an injury to the automobile, was correct, because the receipted bill was not material to any issue in the case and its interpretation, right or wrong, was harmless.

Where a husband abandons his wife and she is compelled to support and care for a minor child of the husband and herself, she becomes entitled to collect such child's earnings, and, if he is injured through negligence of a third person, to maintain an action against such third person for the loss of the services of the child.

FOUR ACTIONS OF TORT, the first two for personal injuries caused by the plaintiff, a minor, being run over by an automobile. The other two actions were by the mother of the plaintiff in the first two actions for consequential damages. Writs dated November 14, 1911.

In the Superior Court the cases were tried together before *Wait*, J. The material facts are stated in the opinion. In each of the

first two cases the jury found for the plaintiff in the sum of \$4,000, and in each of the other two they found for the plaintiff in the sum of \$2,250. The defendants alleged exceptions.

G. L. Mayberry, (*H. L. Sampson* with him,) for the defendant R. H. White Company.

W. H. Hitchcock, for the defendant Autocar Company.

T. H. Buttimer, (*N. P. Sipprelle* with him,) for the plaintiffs.

RUGG, C. J. The material facts out of which these actions arise are these: The Autocar Company sold to the R. H. White Company two motor trucks, and agreed as a part of the contract to furnish with each for seven days without cost a chauffeur, who was a thorough mechanic and who would instruct the men of the R. H. White Company, and to "garage" the trucks, including the making of all ordinary repairs, for twelve months. The contract was in writing. During the seven day instruction period chauffeurs took the trucks from the garage of the Autocar Company and proceeded to the stable of the R. H. White Company where one of its men boarded each of the trucks, which thereafter were used in the delivery of goods of the R. H. White Company until the end of the day, when the men of the R. H. White Company left and the trucks were then driven from its stable to the garage of the Autocar Company by the chauffeurs. During the day the servants of the R. H. White Company gave directions as to the streets and houses to which the trucks should be driven in the delivery of goods, but the manner and speed of driving was wholly within the control of the chauffeurs, who were skilled mechanics in the general employ of the Autocar Company. On one of the journeys from the garage of the Autocar Company to the stable of the R. H. White Company during the seven day period, and when the chauffeurs employed and paid by the Autocar Company were alone on the trucks, the plaintiff Karl was injured, as has been settled by the verdict of the jury, while he was in the exercise of due care, through the negligence of the driver of one of the trucks. The jury found specifically that the negligent chauffeur at the moment of the accident was a servant both of the R. H. White Company and of the Autocar Company. It is contended by each of the defendants that as to it this finding was unwarranted and that a verdict should have been directed in its favor.

The general principles of law which govern cases of this kind have been considered frequently and are well settled. In their application distinctions of nicety may arise when one in the general employment of another is by his consent lent or hired by his master to work for a third in some special service. The test to determine the legal responsibility of that third person for his conduct is, whether in the particular service performed by him he continues subject to the control and direction of his master as to the means to be employed, and the result to be achieved, or becomes subject to that of the third person. This must be considered, as was said by Chief Justice Knowlton in *Shepard v. Jacobs*, 204 Mass. 110, at page 112, not merely with reference to "the general business which the act is intended to promote, but the particular business which calls for the act, in the smallest subdivision that can be made of the business in reference to control and proprietorship." The particular business which the negligent chauffeur was engaged in doing at the time of the accident was that of driving the truck. The driving of the truck during the seven day period was by the terms of the contract exclusively within the control and direction of the Autocar Company. The truck was being driven to the place where the instruction of the servant of the R. H. White Company was to begin. But that place had not been reached. The man to be instructed had not yet appeared on the scene. The instruction had not begun. No employee of that company was on the truck at the time. It was not being used in its business of delivering goods. It was not even being employed for the instruction of its servant. It was wholly in the management and control of the Autocar Company. It was being taken by that company pursuant to its contract to a point where further performance of its contract was to take place. The business of the R. H. White Company had not begun. The only matter about which that company could then have given any authoritative direction was at most as to the place where the instruction should be given and to which the truck should be taken for that purpose. But it could say nothing respecting the route, speed or general or particular method of driving. Its representative was not present and was not intended to be present at the time of the accident, because its business then was not being done. It was not in a position and had no power to give any direction as to the

concrete act of neglect which caused the injury. The chauffeur was not selected by the R. H. White Company. It did not hire him nor could it discharge him, or refuse to accept him provided he was competent; it did not pay him directly or indirectly save as his compensation may have been included in the cost of the truck. The circumstance that the truck belonged to the R. H. White Company is an important but not decisive factor. See *Trombley v. Stevens-Duryea Co.* 206 Mass. 516. It is not quite enough to countervail those mentioned, which, being substantially undisputed, show as matter of law that the injuries to the plaintiffs were not caused by the R. H. White Company.

On this point the case is close to the line and there are none of our decisions precisely in point, but *Bowie v. Coffin Valve Co.* 200 Mass. 571; *S. C.* 206 Mass. 305, *Dutton v. Amesbury National Bank*, 181 Mass. 154, and *Fleischner v. Durgin*, 207 Mass. 435, are somewhat analogous and like conclusions there were reached. *Kellogg v. Church Charity Foundation*, 203 N. Y. 191; *S. C. Ann. Cas.* 1913 A, 883 and note, 886, and *Quarman v. Burnett*, 6 M. & W. 499, go further than is required to relieve the R. H. White Company from liability. In those two cases the defendants owned the vehicles, which were being used in their business by a driver furnished under contract by a third person who alone had the authority to hire, discharge and direct the driver as to the details of his duty of driving, and they were exonerated from liability. Other cases on all fours with the cases against the R. H. White Company hold that the defendant is not liable. *Neff v. Brandeis*, 91 Neb. 11. *Ouellette v. Superior Motor & Machine Works*, 157 Wis. 531. See also *Meyers v. Tri-State Automobile Co.* 121 Minn. 68; *Dalrymple v. Covey Motor Car Co.* 66 Ore. 533.

It is plain from what has been said that the Autocar Company is liable. The injuries were the direct result of a negligent doing of its business by its servant hired by it and at the moment engaged in the performance of his duty as its employee. The actions against that defendant are well within numerous of our cases. They are in legal intent almost exactly like *Roach v. Hinchcliff*, 214 Mass. 267. They are in principle indistinguishable from *Driscoll v. Towle*, 181 Mass. 416, *Corliss v. Keown*, 207 Mass. 149, *Hunt v. New York, New Haven, & Hartford Railroad*,

212 Mass. 102, *Brow v. Boston & Albany Railroad*, 157 Mass. 399, *Hussey v. Franey*, 205 Mass. 413, *Pigeon's Case*, 216 Mass. 51, 54, and *Standard Oil Co. v. Anderson*, 212 U. S. 215.

The Autocar Company furnished chauffeurs for the operation of the trucks to the R. H. White Company after the expiration of the seven day period. Bills for these were put in evidence. They covered the entire period beginning with the first day with a credit "less 7 days no charge." They contained this clause, — "Cars operated by our employees only at owner's risk." The trial judge rightly ruled that this sentence, contained in bills rendered after the accident and not referred to in any way in the written contract between the two defendants, were no part of that agreement. In view of that ruling, it is not necessary to decide whether his interpretation of the sentence was correct or not.

A further question arises as to the right of the plaintiff, Katherine, to maintain an action for expenses incurred by her for the care of and attendance upon her minor son Karl growing out of his injuries and for the loss of his services suffered by her during his nonage. The undisputed evidence showed that before the accident, she had been deserted by her husband, the father of the plaintiff Karl, and at the time of the trial he had been absent four years. His wife did not know where he was living nor even if he were alive. Adjudication had been entered against him on a charge of non-support of his family: thereafter for about six months he paid his wife a weekly allowance and then he disappeared. Since then the mother has supported the son entirely, who had no other means of maintenance. He had performed for his mother whatever service was within the range of his age and ability.

The duty rests upon the father to nurture and support his children in sickness and in health. Filial fidelity demands from children as a reciprocal obligation a degree of service for the father measured by age, ability and reasonable paternal requirement. The father is entitled to such service or the fruit of it if the child is employed by others. These respective duties and obligations have been recognized in the common law from an early day and rest upon deeply rooted natural sentiments. In the event of the death of the father a widowed mother who maintains a home and keeps a family of minor children together and supports

them in part from their own services or earnings, stands in his stead as head of the family in respect of civil responsibility and right. She is entitled to recover damages for expenses incurred and loss of service suffered by a tortious injury to her minor child. *Horgan v. Pacific Mills*, 158 Mass. 402. It has been held also that a wife deserted by her husband may put her minor children out to proper service and assign their wages for the support of the family. A father may forfeit his right to the custody and services of the child by his misconduct. *Dumain v. Gwynne*, 10 Allen, 270, 272. *Abbott v. Converse*, 4 Allen, 530. The right of the father and mother in respect of their children, as was said by Mr. Justice Sheldon in *Purinton v. Jamrock*, 195 Mass. 187, at page 201, "is not an absolute right of property, but is in the nature of a trust reposed in them, and is subject to their correlative duty to care for and protect the child: and the law secures their right only so long as they shall discharge their obligation." The evidence in the case at bar warranted a finding of abandonment by the father of his parental obligations and duties, such as would bar him from all right to collect the son's earnings or to maintain an action for loss of his services. *McCarthy v. Boston & Lowell Railroad*, 148 Mass. 550. There appears to be no sound distinction in principle between a mother widowed and one who has been deserted by a faithless husband and father, and who thus has thrust upon her in fact as large or perhaps an even greater burden of expense and responsibility than if she were a widow. The natural obligations as to nurture and support are as extensive in the one case as in the other. Her necessity is as urgent in one case as in the other. So far as lies in his power, the trust of the father has been abrogated by his act. Sometimes her rights in such cases have been put on the ground of agency from the husband implied from his conduct.

It has been the tendency of our decisions and the positive trend of our statutes to ameliorate the common law disabilities of married women. *Nolin v. Pearson*, 191 Mass. 283. *Bunnell v. Hixon*, 205 Mass. 468. *Wing v. Deans*, 214 Mass. 546. She now stands before the law almost, if not quite, on the same footing as the husband as to all property and business rights, domestic privileges and family immunities, though not charged with equal responsibilities. In case of discord or separation, she has the same

rights as the husband to custody of children. R. L. c. 152, § 28; c. 153, § 37. She is made responsible for pauper support of her children equally with her husband, except that she is exempt from the liability to criminal prosecution in this regard which rests upon the husband. R. L. c. 81, § 10. St. 1909, c. 180, imposes upon both husband and wife penalties for criminal neglect of their children, while the uniform desertion act, St. 1911, c. 456, § 1, makes either the father or the mother liable to severe punishment for desertion or wilful refusal properly to care for and rear their children.

It follows that the right of the wife to maintain an action in a case like the present, even though the husband is living, may rest, also, upon the natural rights and obligations of a mother thrown upon her own resources and compelled by the wrongful act of the husband to assume the duties and discharge the obligations of both parents. This conclusion is supported by decisions of other courts. *McGarr v. National & Providence Worsted Mills*, 24 R. I. 447. *Yost v. Grand Trunk Railway*, 163 Mich. 564. *Savannah, Florida & Western Railway v. Smith*, 93 Ga. 742. *Magnuson v. O'Dea*, 75 Wash. 574. *Nugent v. Powell*, 4 Wyo. 173, 195.

There is nothing at variance with this conclusion in *Gleason v. Boston*, 144 Mass. 25, which held the pauper obligation as to support of minor children under such circumstances did not rest on the mother. This was before the enactment of St. 1898, c. 425, § 3, which made a mother responsible for such support. We do not mean to intimate that the legal obligation of the father is annulled.

The result is that the exceptions of the Autocar Company must be overruled. Those of the R. H. White Company must be sustained, and as verdicts ought to have been directed in its favor, and the cases seem to have been tried fully and fairly, judgment must be entered for it in accordance with St. 1909, c. 236.

So ordered.

MOSES S. CASE, administrator *de bonis non*, vs. FLORENCE E.
CLARK & another.

Norfolk. November 11, 1914. — February 27, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Probate Court, Accounts of administrator, Petition for distribution, Decree. Executor and Administrator. Res Judicata.

A decree of the Probate Court, allowing a first account of an administrator from which it appears that certain sums were paid by him to the next of kin on account of their distributive shares and that there remained in his hands undistributed a large sum of money which at the hearing in the Probate Court was shown to be in great part made up of sums of money paid by the administrator to an adopted son of the intestate in return for his notes, does not prevent the other next of kin from showing, at the hearing of a petition for distribution afterwards filed, that the administrator after the allowance of the account agreed with the adopted son that the sums which had been paid to the son for his notes should be treated as advanced to him on account of his distributive share, such matters not being in any sense *res judicata*.

Upon a petition in the Probate Court by an administrator for a decree of distribution, the function of the court is to decide, from an examination of the whole record and upon weighing all competent evidence, the exact amounts which each distributee should receive in order to make the distribution of the whole estate, including previous advancements, conform to the provisions of law and be just to all the parties in interest.

Upon a petition by an administrator for distribution, the ascertainment with precision of the exact amounts which already have been paid or advanced to the next of kin on account of their distributive shares is a proper subject for inquiry and adjudication. Accordingly it is proper to show that the administrator, after having paid certain sums of money to an adopted son of the intestate in return for his notes, agreed with him that such sums should be treated as advancements, and that, when such sums were treated as advancements to the adopted son, he had received far more than his share of the estate, even if the whole amount remaining in the hands of the administrator were paid to the only other next of kin, the intestate's daughter; and, such facts appearing, a decree ordering the distribution of all the assets to the daughter is warranted.

PETITION for distribution, filed on October 14, 1910, in the Probate Court for the county of Norfolk by the administrator of the estate not already administered of Michael H. Collins, late of Millis.

At the hearing in the Probate Court, it appeared that there

was in the hands of the petitioner \$2,406.54 and accumulated interest and a decree was made that this sum be divided equally between the intestate's daughter, Florence E. Clark, and his adopted son, William F. Collins.

On appeal to the Supreme Judicial Court by Florence E. Clark the case was referred to an auditor, the parties agreeing that the auditor's findings of fact should be final.

Besides the facts stated in the opinion, the auditor found the following: The account filed by the widow of the intestate as his administratrix, the allowance of which William F. Collins contended rendered the contentions of Florence E. Clark *res judicata*, was entitled her first account. As corrected and allowed, its schedules were: Schedule A, \$61,018.91; Schedule B, \$37,253.18; Schedule C (which included the notes given by William F. Collins,) \$23,765.73.

Other material facts are stated in the opinion.

The appeal was heard by *Crosby, J.*, and a final decree was made remanding the case to the Probate Court and ordering that a decree be entered directing the distribution of the entire balance in the hands of the petitioner to Florence E. Clark.

William F. Collins appealed.

H. A. Mintz, for the respondent William F. Collins.

A. T. Johnson, for the respondent Florence E. Clark.

No counsel appeared for the petitioner

Rugg, C. J. This is a petition by an administrator *de bonis non* for the distribution of a balance of an intestate estate. The crucial facts are that Michael H. Collins died in 1891, leaving a widow, a daughter and an adopted son. The widow was appointed administratrix in 1892 and distributed some of the estate among the three entitled thereto, and gave to the son in the form of loans for which notes were taken sums largely in excess of his distributive share. She filed an account of her doings as administratrix in which were credited various sums advanced to the heirs, but none of the transactions touching loans to the son appeared in it. This account was referred to an auditor, who found certain facts respecting loans to the son. The account was then allowed by charging these sums in addition to others as still in the hands of the administratrix. She has died. Nothing can be collected from her estate and a small sum only has been realized by an action on

her bond. The present petition was referred to an auditor with a stipulation that his findings of fact should be final. He found that these advancements to the son by the administratrix, although at first made in the form of loans for which notes were taken, were, by an agreement made between the administratrix and the son subsequently to the filing of her account, treated as additional advancements to the son, \$2,000 more having been advanced at the same time, making the total \$9,800. The aggregate of these advancements to the son, even excluding the last \$2,000, is so largely in excess of the advancements made to the daughter, that if the entire balance now remaining in the hands of the petitioner were paid to her, she would not then receive so much from the estate as has been paid to the son, nor so much as is due as her distributive share. The son contends that these facts cannot be considered at this stage of the proceedings upon a petition for distribution, and that the whole matter, except so far as concerns the balance now in the hands of the administrator *de bonis non*, is *res judicata* by the allowance of the administratrix's account.

These contentions cannot be supported. They are contrary to what is manifestly right. It would be sacrificing justice to a mere form to uphold them.

The question of advancements to heirs on account of distributive shares, as to the matters now in issue, was not raised by the form of the account presented by the administratrix, for she made no reference to the transactions with the son relative to the notes. Although all advancements might have been included in the administratrix's account, she did not so include them and they were not then before the court as advancements. Hence, the allowance of that account, without further reference to the subject, lacks every essential of *res judicata* as to the question here raised. That thing was not adjudicated at all. The notes were treated as assets in the decree allowing that account, and not as representing advancements. Indeed, the agreement between the administratrix and the son that they should be treated as advancements was made at some time after the filing of the account and before the death of the administratrix, the auditor being unable to make a more precise finding.

The purpose of a decree of distribution is to determine the per-

sons to whom payments are to be made and the proportion and the exact sum each is entitled to receive out of the balance remaining to be divided among the heirs at law and next of kin of the intestate. The function of the court upon a petition for a decree of distribution is to decide, from an examination of the whole record and upon weighing all competent evidence, the exact amounts which each distributee ought to receive in order to make the distribution of the whole estate, including all previous advancements, conform to the provisions of law and be just to all the parties in interest. This result can be reached only by a consideration of all pertinent facts which have occurred during the settlement of the estate. The practical wisdom of this rule is apparent from a single illustration. Advancements made on account of distributive shares are proper items for an administrator's account. Such advancements may not have been made in the proportions required for the ultimate just distribution of the estate. In order that a decree for final distribution be a plain and complete guide to the administrator, it must state the exact amount which each distributee is entitled to receive in order to adjust the inequalities which theretofore have arisen. The ascertainment of these precise sums is a proper subject for inquiry and adjudication upon a petition for distribution.

This point has never before arisen for consideration. The present judgment rests wholly upon sound principles of probate administration and not upon the authority of previous decisions.

It is not necessary to pass upon the other questions raised, for the reason that in any event the daughter is entitled to the entire balance in the hands of the administrator *de bonis non*. The decree entered by the single justice is

4 affirmed.

WILLIAM E. HUTCHINS, administrator *de bonis non*, vs.
LURA F. MEAD.

Suffolk. November 13, 1914. — February 27, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Husband and Wife. Fraud. Insolvency. Trust, Resulting. Equity Jurisdiction, Fraud as against creditors. Equity Pleading and Practice, Appeal. Evidence, Presumptions and burden of proof.

In considering this suit in equity on an appeal from a decree made by a single justice who heard the case without oral evidence upon a stenographic report of evidence in another proceeding and certain exhibits, *it was said* that there was no presumption in favor of the finding of the single justice and that, so far as the evidence was concerned, this court stood where he had stood when the decree was made.

Statement by RUGG, C. J., of the principles of law which under the common law and St. 13 Eliz. c. 5 govern the conveyance of property by an insolvent husband to his wife in recognition of a trust, and which determine whether such conveyance is made with intent to defeat, delay and defraud creditors or is made in execution of a valid trust.

In a suit in equity against a woman by the administrator of her husband's estate, which was insolvent, to set aside certain conveyances made by the intestate to the defendant through an intermediary which were alleged to have been fraudulent against his creditors at common law and under St. 13 Eliz. c. 5, there was evidence which warranted findings that the defendant had received from her kindred by inheritance or legacies considerable sums of money from time to time, out of which she made advances to her husband; that he had invested some of the money so received in the purchase of a tract of land, the title to which was taken in his name; that the investment had proved to be profitable and he had invested its proceeds in two other parcels of land, again taking title in his own name; that he recognized the land as the defendant's in each instance, and that, when insolvent, he conveyed the two last named parcels through an intermediary to the defendant. It did not appear that the intestate knew that he was insolvent when he made the conveyances. His debts were chiefly in connection with a large contracting and building firm of which he was a member, which at the time of his death had a number of unfinished contracts involving large sums of money. It did not appear but that, if he had lived, the profits on these contracts might have made the firm solvent. *Held*, that a decree dismissing the bill should be sustained, because findings were warranted that the conveyances in question were made *bona fide* in execution of resulting trusts, and were not made with intent to hinder, delay or defraud creditors.

RUGG, C. J. This is a suit in equity by the administrator *de bonis non* of the insolvent estate of the deceased husband of

the defendant, to set aside conveyances of two parcels of real estate made by the decedent to the defendant through an intermediary something less than a year before his death. The cause comes before us on appeal from a final decree dismissing the bill entered by a single justice of this court,* after considering a stenographic report of evidence taken in another proceeding and certain exhibits, no oral testimony having been heard by him. In reviewing the facts, this court stands where the single justice stood. *Harvey-Watts Co. v. Worcester Umbrella Co.* 193 Mass. 138, 143.

The principles of law which under the common law and St. 13, Eliz. c. 5, govern the conveyance of property by an insolvent husband to his wife in recognition of a trust, and which determine whether such conveyance is made with intent to defeat, delay and defraud creditors, or is made in execution of an outstanding valid trust, have been set forth at length in *Briggs v. Sanford*, 219 Mass. 572, where the authorities are collected. It is not necessary now to do more than summarize them. A husband may hold the title to property in his own name, which in truth belongs to his wife, upon a valid trust for her benefit. Property originally belonging to her, which she has handed over to him and which has been kept by him for a considerable period, may be found to constitute such a trust. If she has permitted him to hold it so that he has been enabled to and has in fact gained credit on the strength of his apparent ownership thereof, she may be estopped to claim it. Where the husband has recognized the existence of the trust and has discharged his fiduciary obligation by transferring the corpus of the trust to the wife, there is a sufficient consideration to support the conveyance. In a sense the trust has been executed and it is not necessary to inquire whether it might have been enforced at the suit of the wife. The relation between a husband and wife is such that transactions between them should be scrutinized with the greatest care to determine whether they are made in good faith, upon a sufficient consideration, and in satisfaction of a genuine trust. It is to be presumed that the natural result of one's acts are intended, and if the transfer is made without the necessary elements to establish a true trust, then it is in

* *De Courcy, J.*

fraud of creditors even though the express design to hinder, delay and defraud creditors may not have been consciously formulated.

A careful examination of the evidence leads to the conclusion that the conveyances here in question were not made in fraud of creditors. There was testimony which was not contradicted and which was supported by some contemporaneous documents, to the effect that the wife by inheritance or legacy received from her kindred considerable sums of money from time to time, out of which advances were made to the husband. In 1891, \$1,000 was handed to him. This was invested in the purchase of a tract of land of considerable size, which was divided into lots, and sold. This purchase was made in association with one Smith, with whom there was then discussion about the money being that of the defendant, but because Smith preferred to have the transaction conducted with Mr. Mead, the conveyance was taken in his name although the investment then was recognized as that of the defendant. The venture resulted ultimately in a net profit above the initial investment of approximately \$6,480. There was some evidence tending to show that the decedent invested the profits of these transactions in the two parcels of real estate, which he conveyed to the defendant in 1908, (in this proceeding sought to be set aside as fraudulent) and that he contemporaneously and at other times before the conveyance referred to these properties as belonging to his wife. This transfer was in substance putting in the name of the defendant real estate which ought to have been conveyed to her in the first instance. Other sums of money belonging to the wife were transferred by her to him as follows: In 1887, \$621.42, in 1906, \$882.48, and in 1907, \$950. There was evidence that the debts of the deceased exceeded his assets at the time of these conveyances. But these debts were chiefly, if not wholly, in connection with a contracting and building partnership of which he was a member and which had continued doing a large business for many years, and which at the time of his death had a number of contracts involving considerable sums of money, some having been taken apparently after these conveyances. It does not appear that the deceased knew that his liabilities exceeded his property at the time of the conveyances, nor does it appear that but for his death the profits on pending contracts might not

have made the firm solvent in fact. The conclusion follows that these conveyances are not shown to have been made with intent to hinder, delay or defraud creditors.

Decree dismissing bill affirmed without costs.

F. N. Nay, (J. L. Bates with him,) for the plaintiff.

R. B. Stanley, for the defendant.

CHARLES H. HUNNEWELL'S CASE.

Suffolk. November 17, 1914. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Workmen's Compensation Act. Proximate Cause.

Upon an application of an employee that compensation under the workmen's compensation act for actual incapacity for work should be continued beyond the date previously fixed, the Industrial Accident Board found that the employee's "total incapacity for work on account of said personal injury will cease . . . [on a day named which was three days after the date of application] subject to the right of said employee to compensation on account of partial incapacity for work under § 10, Part II of the workmen's compensation act, depending upon his ability to earn wages." About six months later the employee filed a request for "a review of weekly payments as provided by § 12, Part III of the act," and the Industrial Accident Board, after a hearing, found that the employee was "partially incapacitated for work" as the result of his original injury, and made an award of weekly compensation under St. 1911, c. 751, Part II, § 10 from a day named which was about four months after the cessation of the payments for his total incapacity for work, to continue so long as his partial incapacity for work should last, which was declared not to be determinable at that time. *Held*, that the board had jurisdiction to make this finding on the question which had been left open by their previous decision, and that the fact that there was an interval of six months during which all weekly payments had ceased did not prevent the decision of this open question when the request under the statute for a review was made by the employee. *Held, also*, that there was no error in making the weekly payments awarded by the board begin two months before the date of the filing of the request for a review, such a retroactive award being within the lawful power of the board.

Where under the workmen's compensation act an employee had been awarded compensation for total disability during a certain period by reason of a slight injury to his eye, and where upon a request for a review of weekly payments under St. 1911, c. 751, Part III, § 12, it was found by an arbitration committee that, although the employee had recovered completely from the injury so far as his eye itself was concerned, "the injury to the eye caused a nervous upset and a neurotic condition which is purely functional," and the Industrial

Accident Board found that the employee was "partially incapacitated for work by reason of a condition of hysterical blindness and neurosis, said condition having a causal relation with the personal injury," and these findings were warranted by the evidence, the Industrial Accident Board properly may make an award to the workman under St. 1911, c. 751, Part II, § 10, on account of partial incapacity for work.

RUGG, C. J. The employee received an injury to his left eye in the course of his work for an employer under the workmen's compensation act, St. 1911, c. 751, on January 25, 1913. He was paid compensation without question until May 31, 1913. Then a hearing was had before an arbitration committee under Part III, § 7, as amended by St. 1912, c. 571, § 12, who on July 28, 1913, made an award of a weekly compensation based on total disability to be paid until October 19, 1913. No claim for review of this decision was filed and it became binding on the parties. On October 16, 1913, the Industrial Accident Board gave a hearing upon the claim of the employee that his compensation should be continued on account of actual incapacity for work. On November 5, the board filed their finding to the effect that the employee's "total incapacity for work on account of said personal injury will cease . . . on October 19, 1913, subject to the right of the said employee to compensation on account of partial incapacity for work under § 10, Part II of the workmen's compensation act, depending upon his ability to earn wages." In accordance with this finding, payment of all compensation to the employee ceased on October 19, 1913. The employee, on May 4, 1914, filed a request for "a review of weekly payments as provided by § 12, Part III of the act," which empowers the board to review "any weekly payment under this act." After a hearing, the board found that the employee was "partially incapacitated for work" as a result of his injury of January 25, 1913, and made an award of weekly compensation dating from February 1, 1914, to continue so long as his partial incapacity should last, a period not determined by the finding. Thus it appears that, by decisions and findings, the employee was refused compensation from October 19, 1913, to February 1, 1914. The insurer seasonably objected to proceedings before the board and now contends that their findings were an excess of jurisdiction.*

* A decree was made in the Superior Court by *Jenney, J.*, declaring that the employee was entitled to a weekly payment of \$10 "from February 1,

The insurer rightly contends that the finding of the arbitration committee, no review having been requested, bound the parties as to all matters covered by it and that it cannot be reviewed under the machinery provided by the act. *Young v. Duncan*, 218 Mass. 346. That finding correctly interpreted does not mean that all compensation shall cease on October 19, 1913, nor that all disability arising from the injury will be at an end on that date. There is no categorical finding to that effect, nor is such a decision fairly to be implied from the terms in which the finding is couched. The finding fixes the amount of compensation on the basis of total disability and payment will end on that day by force of the period limited for its continuance, unless something further is done. But that is its extent. It does not purport to prevent an application to the board under Part III, § 12, before the expiration of the delimited period for a review of the weekly payments allowed. To continue further the same or a smaller weekly payment would be in effect to increase a payment awarded by the arbitration committee which was to cease on October 19, 1913. The employee was not precluded from applying to the board under that section before his weekly payments had ceased.

The board on that application by the employee went no further than to say that the total disability would end on October 19. It did not award any weekly payment for partial disability, nor make any finding on that point, but in effect left it open for later decision "depending upon his ability to earn wages."

The action of the board was not an unqualified decision to end all payments under the act. Such a decision would mean that incapacity of whatever degree arising from the injury had disappeared finally. Doubtless after such a decision the board would be without power to revive the matter. It would have become ended and be entirely a thing of the past. The doctrine of *res judicata* would apply to it. *Nicholson v. Piper*, [1907] A. C. 215. *Green v. Cammell, Laird & Co. Ltd.* [1913] 3 K. B. 665. In this respect our act is in substantially the same words as the English

1914, and continuing during the period of his partial incapacity for work, which is not now determinable, the total amount due to June 10, 1914, being \$184.29," and ordering the payment by the insurer to the employee of that sum of money. The insurer appealed.

act and hence English decisions made before the passage of our act are strongly persuasive of the meaning intended by the General Court. *McNicol's Case*, 215 Mass. 497, 499. The form of the decision of the board was only that the total disability had ceased, but whether there was a partial disability or not was left open for further consideration to be determined somewhat in the light of future ability to get work. The weekly payment was ended absolutely so far as it rested on the basis of total disability, but it was suspended only until the further order of the board, so far as it might later be found to have a sound basis in partial disability. In substance the decision was that total disability was over, but whether there would be a partial disability arising out of the injury was a question as to which they were not at that time prepared to give a decision either way, but desired to leave it open still as a question to be answered as the facts might warrant at some future time. This course is justified by the act. It has been the custom under the English act to award compensation at the rate of a penny a week under these circumstances. *Owners of the Vessel Tynron v. Morgan*, [1909] 2 K. B. 66; S. C. 2 B. W. C. C. 406. *Griga v. Owners of the Ship Arelda*, 3 B. W. C. C. 116. That course never has been followed, so far as we are aware, under our act. But it is not necessary even in England that this be done in order to keep the case alive, provided the purpose is plain not to terminate the claim definitively, but to keep it open for further consideration and order. *Taylor v. London & North Western Railway*, [1912] A. C. 242, 245. That purpose is manifest in the decision here under review. There is nothing in the words of our act which prevents the board from pursuing this course. The procedure should be flexible and adapted to the direct accomplishment of the aim of the act, with as little formality or hampering restriction as is consistent with the preservation of the real rights of the parties and the doing of justice according to terms of the act. It is within the power of the board to decide that for a time compensation shall be suspended but not ended, with reservation of leave to the employee to apply for further payments under the act, provided this course in their opinion is required by the facts. There is nothing inconsistent with this conclusion in *Burns's Case*, 218 Mass. 8.

It is urged that because all weekly payments in fact stopped, there was nothing further for the board to deal with under Part III, § 12, and that it could not end, diminish or increase a weekly payment which had ceased to exist six months before the hearing. That contention would be unanswerable if the earlier decision had been that weekly payments should end finally. But, as has been pointed out, that was not the earlier decision and the board in its decision now under review was proceeding strictly in accordance with the lines left open by express reservation in its former decision. The propriety of such a decision, in order to further the purpose of the act, has been pointed out in *Owners of the Vessel Tynron v. Morgan*, [1909] 2 K. B. 66, at page 70. If, for example, the injury is of such nature that the employee may work at full pay at certain times dependent upon temperature or climate, and at other seasons is incapacitated, it would not be in harmony with the design of the act either to give him compensation while he was earning his normal wages or to deny it to him during the time when incapacitated by his injury.

The decision in this respect might be made to take effect as of a date antecedent to the date of the application. *Bagley v. Furness, Withey & Co. Ltd.* [1914] 3 K. B. 974. *Gibson & Co. v. Wishart*, [1914] W. N. 232. Hence the award of the board on the application of the employee filed in May, that the weekly compensation should be paid from the first of the preceding February, was within their lawful power.

The physical injury to the eye of the employee in the case at bar was slight and he soon recovered from it completely so far as concerned harm to the organ itself. But the arbitration committee found that "the injury to the eye caused a nervous upset and a neurotic condition which is purely functional." The Industrial Accident Board found that he was "partially incapacitated for work by reason of a condition of hysterical blindness and neurosis, said condition having a causal relation with the personal injury." These findings, which seem to be identical in substance, were warranted by the evidence. Apparently he did not have sufficient will power to throw off this condition and go to work as his physical capacity amply warranted him in doing. But such a condition resulting from a battery is an injury for which a tortfeasor would be liable in damages. *Spade v. Lynn*

& *Boston Railroad*, 168 Mass. 285; *S. C.* 172 Mass. 488. *Berard v. Boston & Albany Railroad*, 177 Mass. 179. *Homans v. Boston Elevated Railway*, 180 Mass. 456. *Bell v. New York, New Haven, & Hartford Railroad*, 217 Mass. 408, 410. The same principle applies to injuries flowing as a proximate result from an actual physical impact received by an employee under the act in the course of and arising out of his employment.

Decree affirmed.

W. B. Luther, for the insurer.

A. R. Shrigley, for the employee.

ADELAIDE P. FARRIS, administratrix, vs. ST. PAUL'S BAPTIST CHURCH.

Suffolk. November 18, 1914. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Practice, Civil, Exceptions, Amendment of record. *Rules of Court*. *Bills and Notes*. *Religious Society*.

Rule 64 of the Superior Court, providing that where "bills of exceptions have been filed and remained without action for three months, the clerk shall forthwith notify the parties interested that unless within thirty days thereafter the bill of exceptions is presented to the presiding justice for allowance, it will be dismissed and judgment will be entered as though no exceptions had been filed," has no application where a bill of exceptions was presented to the judge and a hearing was had thereon within the time allowed by an order of extension, although the excepting party failed to file an amended bill within a time orally agreed upon with the judge at the hearing which was after the day named in the order of extension, because the judge must be considered to have the allowance of the bill still under consideration.

If, in such a case, the clerk of court, without any preliminary warning notice to the parties, enters a judgment on which execution is issued, upon a motion of the excepting party an order will be made that the record shall be amended by striking out all matters relating to the judgment and the issuing of execution, such entries having been made by the clerk without authority.

A court of record has ample power to correct mistakes in its records by ordering the striking out of entries made by the clerk of the court without authority.

Where a promissory note, which was given in the name and behalf of an incorporated religious society to the pastor of the society for back salary, was signed by the treasurer and clerk of the society and by eight persons described as deacons, of whom five were deacons and the other three were subdeacons, and where it appeared that the whole number of deacons was seven, that by the by-laws of the society its board of deacons had extensive powers as to its business affairs, and that a vote of the society authorized such a note to be signed by its board of deacons, it was *held*, that the signing by a majority of the board of deacons, in addition to the signatures of the society's treasurer and clerk, was sufficient to bind the society, the signatures of the three subdeacons being immaterial and having no effect to diminish the binding force of an execution by a majority of the deacons.

CONTRACT by the administratrix of the estate of Benjamin W. Farris against the St. Paul's Baptist Church of Boston, an incorporated religious society, on an alleged promissory note of the defendant, signed by eight persons designated as deacons of the defendant and by two others designated respectively as treasurer and church clerk, originally for \$1,465, with payments indorsed thereon amounting to \$144.08, the note having been made payable to the plaintiff's intestate in his lifetime and having been given in payment of back salary due to him as the pastor of the church. Writ dated February 2, 1912.

At the trial in the Superior Court before *White, J.*, the jury returned a verdict for the plaintiff in the sum of \$1,811.45. The defendant alleged exceptions. The plaintiff filed a motion to dismiss the bill of exceptions, which was denied by the judge. The plaintiff alleged exceptions to this denial. On June 26, 1914, the judge allowed the defendant's exceptions and also allowed the plaintiff's exceptions. The questions raised by both bills of exceptions are stated in the opinion.

The whole of Rule 64 of the Superior Court, of which a part is quoted in the opinion, is as follows:

"In all causes in which bills of exceptions have been filed and remained without action thereon for three months, the clerk shall forthwith notify the parties interested that unless within thirty days thereafter the bill of exceptions is presented to the presiding justice for allowance, it will be dismissed and judgment will be entered as though no exceptions had been filed.

"If within said thirty days the bill of exceptions is not allowed or an order extending the time for hearing and allowance thereof made in the cause, the exceptions shall be dismissed as of course

and judgment be entered as though no bill of exceptions had been filed."

J. T. Maguire & J. M. Brown, for the defendant.

G. A. Sanders, for the plaintiff.

RUGG, C. J. The plaintiff's exceptions raise a point of practice as to the allowance of the defendant's exceptions filed on April 24, 1913. The time for the allowance of these exceptions, by order of court entered within three months thereafter, was extended, St. 1911, c. 212, § 2, to October 1, 1913. Two days before the expiration of this extension there was a hearing on the allowance of the exceptions, and leave was given orally to present an amended bill of exceptions on or before October 6, 1913, but no such bill was filed within this time.

On October 6, 1913, the clerk, without special order of the court, entered judgment for the plaintiff. He evidently acted on the theory that the case came within Rule 64 of the Superior Court, which provides that where "bills of exceptions have been filed and remained without action for three months, the clerk shall forthwith notify the parties interested that unless within thirty days thereafter the bill of exceptions is presented to the presiding justice for allowance, it will be dismissed and judgment entered as though no exceptions had been filed." That rule was not applicable to these facts. The bill of exceptions had been presented to the judge and a hearing had within the time allowed by the order of extension. It appears to have been under consideration by him. No preliminary warning notice had been sent by the clerk.

Upon a motion filed on November 1, 1913, the court having found among other facts that the "entry of judgment and issuance of execution are erroneous and made by mistake" and that the record ought to be amended in order to conform to the truth, entered an order that all matters relating to the entry of judgment and issuance of execution be stricken from the record.

There is no error of law in this procedure. The matters stricken from the record were entered by the clerk without the direction of the court and were not as matter of law appropriate entries to be made in course under the circumstances. The rule means that exceptions ordinarily shall not be dismissed until after the warning notice from the clerk to the effect that they will be

dismissed within thirty days if not presented for allowance, unless, perhaps, when special order to the contrary is made by the court as a part of an order of extension. After such notice has been sent, then they will be dismissed automatically under the rule unless allowed or order extending the time is made.

The court has ample power to correct mistakes like this found in its records. *Karrick v. Wetmore*, 210 Mass. 578. See also *Drinkwater v. Frank*, 213 Mass. 194; *Hathaway v. Congregation Ohab Shalom*, 216 Mass. 539, 542. The defendant's exceptions rightly were allowed, and the plaintiff's exceptions must be overruled.

The defendant's exceptions relate to an action upon a note to the order of the plaintiff's intestate, purporting to be executed by the deacons, treasurer and clerk of the defendant. It seeks to escape liability because the note is signed by five deacons only, and not by the full board of seven. The by-laws of the defendant confer upon its board of deacons extensive powers as to its business affairs. The vote of the defendant authorized a note to be signed by its board of deacons. Under all the circumstances, a signing by a majority of the board was enough in this respect to bind the defendant. *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, 281. *Young v. Canada, Atlantic & Plant Steamship Co. Ltd.* 211 Mass. 453, 457.

Three other persons called subdeacons signed the note. But their signatures did not diminish the binding force of execution by a majority of the deacons.

The vote of the church did not specify the date for the note. But there was evidence that its amount in fact was ascertained from two previous notes whose amount on May 1, 1907, the date inserted in the new note, was the sum appearing on the face of the new note. The facts respecting the old notes as a basis for the new one were brought fully to the attention of the meeting at which the vote was passed. Payments were made on account of the new note. There was ample evidence that its date was within the scope of the vote.

Plaintiff's exceptions overruled.

Defendant's exceptions overruled.

JOHN M. ANDERSON vs. OLGA J. BEAN & others.

Suffolk. November 18, 1914. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Devise and Legacy.

A testator left two sons and one whom he treated as a daughter. He created by his will a trust for the benefit of these three which should continue during the lifetime of the testator's brother, who was his partner, or until such brother should determine to retire from the management and control of the business. The net income of the trust fund the trustee was directed to "pay over and divide in equal shares quarter-annually to and among my sons . . . and the said" *quasi* daughter "for and during their natural lives, or until the termination of this trust." At the termination of the trust by the death or retirement from business of the testator's brother, the trustee was directed, after making certain payments, to "pay over all the rest, residue and remainder of the property and estate then in trust hereunder, together with any accumulations of interest thereon in equal shares, one-third thereof" to each of his two sons and the *quasi* daughter, "if they be then living. If either or any of them shall have died before the time set for the distribution of said trust fund, leaving issue, then such issue shall take by right of representation the share its or their parent would have taken if living at the time of such distribution." While the trust was in existence the *quasi* daughter died leaving a child. The two sons were living. The trustee brought a bill for instructions as to the distribution of the income from the trust. *Held*, that the testator had made a clear distinction between the manner of distributing the income of the trust and that of distributing the principal fund on the termination of the trust; that the whole of the income was given to the three persons named and the survivors or survivor of them until the termination of the trust, and accordingly should be divided equally between the two sons of the testator to the exclusion of the child of the *quasi* daughter.

BILL IN EQUITY, filed in the Supreme Judicial Court by the trustee under the will of Albert Anderson, late of Boston, for instructions as to the proper distribution of the income of the trust fund.

The case came on to be heard before *Braley, J.*, who reserved it upon the bill and answers for determination by the full court of the questions which are stated in the opinion.

A. P. Stone, for the plaintiff, was present but did not address the court.

F. L. Simpson, (*F. M. Carroll* with him,) for the defendant Olga J. Bean.

A. H. Russell, for the defendants Albert B. and Andreas Anderson.

DE COURCY, J. The plaintiff is trustee under the will of his brother, Albert Anderson. The defendants Albert B. Anderson and Andreas Anderson are sons of the testator. The defendant Olga J. Bean is the infant child of Olga M. Bean, deceased, whose name before her marriage was Olga M. Garllus but who went by the name of Olga M. Anderson, and who, from the age of three years, had lived in the household of the testator as a member of his family. A large part of his property was invested in the Albert and J. M. Anderson Manufacturing Company, and he empowered the trustee to continue that investment. The trust is to continue so long as John M. Anderson lives, or until he shall determine to retire from the management and control of the business.

During the continuance of the trust the net income, subject to certain payments not herein material, is disposed of by clause fourth (e) as follows: "All the rest and remainder of said net income after the payments aforesaid, my trustee or trustees hereunder shall pay over and divide in equal shares quarterly to and among my sons Albert B. Anderson and Andreas Anderson and the said Olga M. Garllus or Anderson for and during their natural lives, or until the termination of this trust, as hereinafter provided." The trust has not terminated. Olga M. has died, leaving a child; and the sons Albert B. and Andreas are living.

The question presented by the trustee's bill for instructions relates to the share of income heretofore payable to Olga M. Is he to (1) pay it over to or for the benefit of the child Olga J. Bean, or (2) divide it between the sons Albert B. and Andreas, or (3) allow it to accumulate, to be disposed of upon the termination of the trust? This last suggestion is not advocated by any party in interest, and may be disposed of briefly by saying that not only is there no provision that the income should accumulate in the contingency which has occurred, but the general scheme of the will is inconsistent with any such intention on the part of the testator. *Meserve v. Haak*, 191 Mass. 220.

The express language of the clause in controversy limits the right of each of the three beneficiaries in the income to his or her lifetime, if the trust so long continues; and it makes no provision for giving it to their issue, in the event of the death of one or more of them leaving issue, before the termination of the trust. This is especially significant in view of the provision deliberately made for survivorship in the principal fund, which appears later in the same paragraph of the will, and is as follows: "After setting aside such funds as aforesaid, they shall pay over all the rest, residue and remainder of the property and estate then in trust hereunder, together with any accumulations of interest thereon in equal shares, one third thereof to my son Albert B. Anderson, one third thereof to my son Andreas Anderson and one third thereof to the said Olga M. Garllus or Anderson, if they be then living. If either or any of them shall have died before the time set for the distribution of said trust fund, leaving issue, then such issue shall take by right of representation the share its or their parent would have taken if living at the time of such distribution. Or if either or any of them shall have died leaving no issue, then the fund or funds coming to the one or ones so deceasing without issue shall be paid to the survivor or survivors of them in equal shares." In the closing sentence of the same paragraph it is also provided that on the death of certain annuitants the trustee "shall in each case distribute the principal of the fund held to provide for the annuity so ceasing to and among the said Albert B. Anderson, Andreas Anderson and Olga M. Garllus or Anderson, or to the issue of them in manner aforesaid, and so from time to time until the whole of the fund hereby placed in trust shall have been distributed and paid over to and among them or the issue of them." It is manifest that the testator knew how to provide for the right of survivorship. And when we contrast the language he used as to the disposition of income with that used in disposing of principal, we cannot avoid the conclusion that the difference in language, used clearly and advisedly, indicates a difference in his intention as to the right of survivorship, when dealing with the principal and with the income. Considering the clause in question in connection with the entire will, and especially with the other portions of paragraph fourth (e), it seems apparent that the testator intended to treat the income as a whole, and to

divide it among the members of his family until his brother should give up the management of the family business. For it must be remembered that he regarded Olga M. as a daughter, and had a petition for her adoption pending at the time of his decease.

It is urged, in an able argument of counsel for Olga J. Bean, that ordinarily a gift of property to several persons by name, to be divided among them "in equal shares," as in this case, is a gift to them as tenants in common, and not as joint tenants or as a class. *Stanwood v. Stanwood*, 179 Mass. 223. *Worcester Trust Co. v. Turner*, 210 Mass. 115. But in this will the interest of the beneficiaries is expressly limited "for and during their natural lives." See *Loomis v. Gorham*, 186 Mass. 444. Again, assuming that Olga M. had a vested interest in the principal of the trust fund, it is specifically limited to the time of distribution, which has not yet arrived. The provision in paragraph fifth of the will, empowering the trustee to use a portion of the principal for the proper support of any of the beneficiaries, applies apparently only to the portion of which the beneficiary has the income, and does not assist us in interpreting the clause in question. Nor do we think that the possibility of all three of the beneficiaries dying before the termination of the trust manifests an intention that the income should go to the issue of one who dies pending the trust. When the purpose of the testator is reasonably clear by reading his words in their natural sense, "we must not be deterred by the conjecture that some remote consequences were not in the testator's mind, or might not have been quite satisfactory to him, if he had thought of them." Holmes, J., in *Dove v. Johnson*, 141 Mass. 287, 290.

It strongly is argued that the testator, whose fatherly interest in Olga M. is manifested in paragraph second and elsewhere in the will, could not have intended to leave her child unprovided for. The explanation may be the quite common one, that he did not anticipate the contingency which has happened, namely, that after his death Olga M. might marry, and might die leaving issue before the termination of the trust. The court however can only ascertain the intention of the testator from the language he used, and declare it. It is not our province to conjecture what his intent would be if he had in contemplation the present situa-

tion, and to read that intent into his will. See *Sanger v. Bourke*, 209 Mass. 481, 487, and cases cited.

We are of opinion that the testator, by the clause in question, gave the income to Albert B. Anderson, Andreas Anderson and Olga M. Garllus or Anderson as a class, with rights of survivorship. *Loring v. Coolidge*, 99 Mass. 191. *Wheaton v. Batcheller*, 211 Mass. 223. A decree is to be entered directing the trustee to distribute the remainder of the net income to the two surviving beneficiaries in equal shares. Costs are to be allowed out of the fund in controversy as between solicitor and client.

Decree accordingly.

JAMES E. LEWIS vs. GRACE E. LEWIS.

Suffolk. November 19, 1914. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Practice, Civil, New trial, Mistrial, Secret instruction. *Words*, "Pleading or procedure."

Where a judge, who had presided at a trial, sent from the lobby of the court to the jury in their retiring room, without the knowledge of the counsel on either side, an answer in writing to a question in writing from the jury and with his answer sent a statement that the question and the answer were immaterial, and where nothing was known in regard to the substance or the nature of the question or the answer except that in the opinion of the judge they were immaterial to any issue submitted to the jury, this was held to constitute a mistrial and to require that a verdict returned by the jury after the communication was received by them should be set aside.

The giving of such a secret instruction is an error of substance in regard to an essential feature of trial by jury and is not a "matter of pleading or procedure" within the meaning of St. 1913, c. 716.

RUGG, C. J. The plaintiff and the husband of the defendant were copartners in the coal business. The defendant was appointed administratrix of the estate of her husband. After some negotiation an agreement was reached whereby the plaintiff bought the share of his deceased partner in the business for \$40,000. An "Indenture of Sale" was executed by the defendant both as administratrix and individually, transferring to

him all the right, title and interest of the estate of his former partner in the firm assets, including all accounts and bills due to the copartnership, he assuming all its debts and obligations. In the meantime, after the decease of the husband but before the sale, the plaintiff advanced to the defendant \$720 through checks of J. E. Lewis and Company, the style of the former firm, and coal to the value of \$60.75. This action is brought to collect these charges. No mention was made of this account at the time of transfer of the share of the deceased in the partnership, and the plaintiff did not then inform the defendant that she would be required to pay it. No reference is made to the matter in the indenture of sale. The evidence was in conflict touching the point whether before the sale bills therefor had been sent to the defendant and a demand for payment had been made upon her.

The jury were instructed in substance that they were to determine on all the evidence whether both the plaintiff and the defendant understood that the personal account against Mrs. Lewis here in suit should be wiped out. Various requests for rulings by the defendant presented in different forms the proposition that the plaintiff as surviving partner was under a general duty to make full disclosure of the affairs of the partnership to the defendant. However sound in law these requests may be, they were not germane to the issue raised. Here was no question of concealment, fraud or misrepresentation. It is not contended that the price agreed upon for the sale of the partnership interest was not fair. There was no doubt about the fact that the items in the plaintiff's account had been furnished to the defendant. The real point of disagreement was whether the parties intended to extinguish liability for these items by transactions connected with the sale. The presiding judge* performed his duty by stating the simple issue and leaving it to the jury as a plain controversy of fact far better than by undertaking to lay down principles of law more or less remotely connected with the general relations of the parties, but which had nothing to do with the matter in dispute. No error is disclosed in the requests refused or in the rulings given.

* *Morton, J.*

The troublesome aspect of the exceptions is this: After retiring for deliberation, the jury sent a written request for information to the judge, who was in his lobby. Without causing the jury to be brought into open court and without returning to the court room, he gave an answer in writing and thereupon the jury returned a verdict for the plaintiff. Both parties, with their counsel, were in the court room during the entire period from the time when the jury retired until the verdict was returned. The nature of the communication was not given out, is not disclosed on the record, and the excepting party is ignorant of the contents of the communication from the jury to the judge and from the judge to the jury. Immediately upon learning these facts, the defendant filed a motion for a new trial founded upon them. After a hearing the judge denied the motion, filing therewith a statement printed in the footnote.*

It is plain that apart from St. 1913, c. 716, this irregularity would have required a setting aside of the verdict. This was settled in 1823 by *Sargent v. Roberts*, 1 Pick. 337, where in an illuminating opinion by Chief Justice Parker, the principle was established "that no communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court, and, where practicable, in the presence of the counsel in the cause. . . . The only sure way to prevent all jealousies and suspicions is to consider the judge as having no control whatever

* "The written instructions referred to in the motion for a new trial consisted of a written answer to a written question sent to the judge by the foreman of the jury under the following circumstances:

"The judge had retired to the Superior Court lobby to await the verdict on the last case of the session, court not having been adjourned. The communication referred to was brought to the lobby between one and two P.M.

"The judge, believing that counsel had gone to their offices, and that an answer to the question, which in his opinion was immaterial to any issue submitted to the jury, did not require counsel to be put to the inconvenience of returning to the court room, sent a written answer, accompanied by the statement that the question and answer were immaterial.

"The action of the judge, although it may be deemed irregular, did not, in my opinion, injuriously affect the substantial rights of the parties, and therefore, in accordance with the provisions of St. 1913, c. 716, the motion is denied."

over the case, except in open court in the presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice." This case has been recognized generally as a leading case, and has been widely cited and approved. See notes 17 L. R. A. (N. S.) 609, 16 Ann. Cas. 1133, 1141, 14 Ann. Cas. 511, 514, where a large number of authorities are collected. It has been followed always in our own decisions. *Read v. Cambridge*, 124 Mass. 567.

In *Merrill v. Nary*, 10 Allen, 416, it was held that for the judge to permit the jury to take a copy of the statutes to their room without the knowledge of the parties was such an irregularity as to require the setting aside of the verdict. It was said by Chief Justice Bigelow, that "the only regular and safe mode of conducting trials is, for the court to instruct the jury on all material points before they retire to deliberate upon their verdict, and, if they have occasion for further information, they should return into court and state the questions on which they wish for further advice, and receive in open court such directions as may seem to the judge material and necessary."

But, as was said by Chief Justice Shaw in *Commonwealth v. Roby*, 12 Pick. 496, at page 516, "It is not every irregularity which will render the verdict void and warrant setting it aside. This depends upon another and additional consideration, namely, whether the irregularity is of such a nature as to affect the impartiality, purity and regularity of the verdict itself." In that case it was held, after a full review of authorities, that the irregularity of furnishing refreshment to the jury after they had agreed upon their verdict, but before it was returned into court, at their own expense, through the agency of the officer in charge, without direction of the court, although reprehensible, did not require a new trial.

In *Kullberg v. O'Donnell*, 158 Mass. 405, it was held that it was not reversible error for the judge, after the jury had been deliberating for a considerable time and had failed to agree, to call them into the court room and there openly give additional instructions in the absence of counsel, it being the duty of counsel or the parties to remain in court after the trial of an action was begun until it was finished, if they desired to be pres-

ent at all proceedings in the cause. But it there was said by Chief Justice Field, "It is plain . . . that all instructions to the jury must be in open court."

In *Commonwealth v. Heden*, 162 Mass. 521, it was held that it was not error for the judge to communicate to the jury through the officer in charge of them, that upon agreeing on a verdict it might be put in writing and they might separate.

In *Moseley v. Washburn*, 165 Mass. 417, the amount of the verdict depended upon two executions. Full instructions were given as to the computation of interest upon these sums, to which no exception was taken. Later, the jury sent a note to the judge by the officer, inquiring the date from which interest should be computed. Thereupon, by direction of the judge, the officer procured from the jury room the executions and the judge showed to him the date on each execution which had been pointed out to the jury in the charge, as the date from which interest should be computed, and directed him to return the executions to the foreman and to point out to him the dates which thus had been indicated. The officer followed these instructions and a verdict was returned for the plaintiff with interest computed accordingly. It there was said that, although the practice was not to be commended, it was not necessary to set aside the verdicts on the ground that the dates from which interest was to be reckoned had been pointed out correctly in the charge in open court and the interest became, therefore, a mere matter of method of computation which the record showed had been cast correctly. The opinion of the court, by Chief Justice Field, concluded as follows: "Under these circumstances it is certain that the instructions sent to the jury by the officer had no tendency to influence the decision of the jury upon the merits of the causes, and the irregularity does not seem to us of sufficient importance to require the verdicts to be set aside on the ground that there is or should be an absolute rule of law in such a case."

In *Whitney v. Commonwealth*, 190 Mass. 531, these facts appeared: Late in the evening, after the judge had gone home, a distance of several miles, the jury, having agreed upon their verdict, were in doubt which of several forms handed them to use in expressing their decision, which doubt was communicated to the judge by the officer in charge of the jury. Thereupon the foreman,

in the presence of all the jury and the officer, and with no other person present, telephoned the difficulty to the judge, who over the telephone repeated to the foreman in substance what had been said in the charge as to which forms were intended to express the different conclusions reached. The foreman then repeated this statement to the jury in the telephonic hearing of the judge. The jury were within the hearing of everything said by the foreman and the foreman repeated to the jury everything said by the judge. It was said by Chief Justice Knowlton in delivering the opinion of the court, in effect, that this was a direction to the whole jury "merely as to the proper way to exhibit and preserve their verdict on paper, after they had decided upon it, so that there might be no mistake in presenting it to the court. The communication was, in principle, not very different from the common direction, given through the officer to a jury who agree in the night time, to seal up their verdict and bring it into court the next day. . . . It went a little further in telling them how to use the machinery that had been provided for that purpose, but the information was limited to assistance in the use of this machinery, and did not touch any matter that could affect the substance of the verdict itself, before it was agreed upon. There are grave objections to any communication with a jury made as this was. The possibility of misunderstanding or mistake involved in it is such as should preclude the adoption of it, unless in cases of great emergency; but the facts stated in this case make it certain that no miscarriage of justice has resulted. Limited as this communication was to a collateral direction as to the manner of using the papers supplied for the reception of the verdict, it does not require us to set the verdict aside."

In all these cases where it has been held that the irregularity was not fatal, the facts were disclosed fully and all that was communicated by the judge to the jury was plainly set forth on the record. In the case at bar, the excepting party did not know at the time and does not know now the substance or nature of the communication from the jury to the judge, nor of his reply. The statement filed by the judge throws no light upon the subject, and we are as ignorant as the excepting party. The question is, whether under these circumstances a new trial is required, in view of St. 1913, c. 716, § 1, whereby it is provided that "No

new trial shall be granted in any civil action or proceeding on the ground of improper admission or rejection of evidence, or for any error as to any matter of pleading or procedure, if, in the opinion of the judge who presided at the trial when application is made by motion for a new trial, or in the opinion of the Supreme Judicial Court when application is made by exceptions or otherwise, the error complained of has not injuriously affected the substantial rights of the parties." The judge who presided at the trial has expressed his opinion of harmlessness as to the matter under review in the phrase of the statute.

The statute does not reach to such a situation as that here presented. It is not plainly stated that the question of the jury and the answer of the judge related to a matter of law. But it is almost inconceivable that a jury should propound any question to a judge whose purpose was not to gain some information about the law. The statement of the judge seems to indicate that it related to law. The inference from all the circumstances is almost irresistible that it concerned some matter of law and hence must be treated on that footing. The giving of secret instructions as to the law is not comprehended within the words "pleading or procedure." It is to be noted that our statute relates only to pleading and procedure and does not extend to "misdirection" as does Order XXXIX. r. 6 of the English Rules of the Supreme Court. *Bray v. Ford*, [1896] A. C. 44. Correct instructions upon matters of law are of the very substance of jury trial at common law. *Bothwell v. Boston Elevated Railway*, 215 Mass. 467, 476. This is different in kind from mere procedure. It is of last importance that parties and their counsel duly vigilant in the performance of their duty touching an action on trial have the opportunity to know the principles of law which are laid down for the guidance of the jury. Secret instructions or clandestine communications, no matter if given with the best of intentions, contravene this fundamental and essential conception of common law trial by jury. One of the distinguishing characteristics of the common law is that its trials are public. The incentives to the maintenance of correct principles and high ideals in the administration of justice which arise from the consciousness on the part of those who participate in trials, that they are open to the public, are important safeguards for the purity, impartiality and

learning of courts and for the uprightness, sound sense and integrity of juries. Hearings *in camera* in common law courts are so contrary to the spirit of that law as to be regarded as almost, if not quite, impossible. See *Scott v. Scott*, [1913] A. C. 417. That is the general rule. It has its roots far back in the history of the common law and of free institutions. It appears to be one of its most signal advantages. This feature is a priceless inheritance and one to a high degree calculated to preserve to the future the precious privilege of equality before the law. It is not necessary to discuss any apparent or real exceptions to this general rule, for certainly the present case cannot in any view fall outside that rule.

The communication in the case at bar must be treated as having been an instruction as to law. It was given in secret and not disclosed to counsel nor spread upon the record. All that is known respecting it is that the judge who gave it regarded it as immaterial. If it was immaterial, it ought not to have been given, though the giving of it publicly might not have been reversible error. But the fatal objection is that nobody else can tell whether it was immaterial or not. It was the right of the parties to know what it was, in order that they might determine that question for themselves and assent to it expressly or by silence, or to ask to have it reviewed on exceptions. That right was one of substance and not of form. It was denied. The failure to recognize it was not a mere error as to pleading or procedure, but as to an essential feature of trial by jury.

Exceptions sustained.

A. E. Yont, for the defendant.

J. G. Wright, for the plaintiff.

JAMES GARDNER vs. COPLEY-PLAZA OPERATING COMPANY.

Middlesex. November 20, 1914. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, In building in process of construction, In operating elevator, Licensee.
Elevator. Agency. Practice, Civil, Exceptions, Rulings and instructions.

In an action against the lessee of a hotel for injuries sustained by an employee of a subcontractor, when the defendant had taken at least partial possession of the hotel under his lease and was getting it ready to open to the public and the general contractor was putting on the finishing touches, from an elevator operated negligently by one of the defendant's elevator boys descending on the plaintiff as he was working in the elevator well underneath it, where there is evidence that the general contractor had requested that the defendant's elevator boys might be at the building on the day that the accident happened for the use of the contractor and subcontractor in putting the finishing touches on the building, and where there also is evidence that the elevator that crushed the plaintiff was being operated at the time to carry employees of the defendant for the purpose of performing their work as such employees, the question whether the negligent elevator boy at the time of the accident was in the employ of the defendant is for the jury.

The refusal of the presiding judge at the trial of an action of tort for personal injuries to make a ruling which is not applicable to the evidence affords no ground for exception, even when the ruling thus requested is correct as an abstract proposition of law. In the present case the abstract soundness of the ruling thus requested and properly refused was open to grave doubt.

Where the general contractor for the construction of a hotel and one of the subcontractors are putting on the finishing touches and the lessee of the hotel is at least in partial possession of it, being engaged in installing its furniture and supplies and getting it ready to open to the public, an employee of the subcontractor, who is working in the well of one of the elevators of the hotel engaged in making the hotel suitable for occupancy, is not a mere licensee of the lessee of the hotel but is rightfully at his post and the lessee owes him the duty not to injure him negligently.

Such employee of the subcontractor does not assume as matter of law the risk of being crushed by reason of the negligence of an elevator boy of the lessee who is operating an elevator above the part of the elevator well where such employee of the subcontractor is working.

TORT for personal injuries sustained by the plaintiff at about eleven o'clock in the morning of Sunday, July 28, 1912, when the plaintiff was in the employ of the Winslow Brothers Company, a corporation, which was a subcontractor under a contract with the George A. Fuller Company, a corporation, which was the

general contractor for the construction of the Copley-Plaza Hotel under a contract with the trustees of the Copley Square Trust, against the Copley-Plaza Operating Company, a corporation, which was the lessee of the hotel, the declaration alleging that the plaintiff's injuries were caused by his being struck by an elevator negligently operated by a servant of the defendant when the plaintiff was at work in the elevator well numbered six, at the time when the finishing touches were being put on the hotel by the general contractor to make it ready for its public opening and the reception of guests. Writ dated March 22, 1913.

In the Superior Court the case was tried before *Stevens, J.* It was not questioned that the work that was being done on Sunday when the plaintiff was injured was necessary and was authorized by a permit issued under St. 1909, c. 420, § 1. On the morning in question the plaintiff was regulating various elevator doors in the different elevator wells and upon different floors, which did not run properly for various reasons. The work of regulating the elevator doors was included in the contract of his employer, Winslow Brothers Company, with the George A. Fuller Company. It appeared that the door of elevator six on the fourth floor bound against a toggle-bolt which projected inside of the iron grill work dividing the shaft from the corridor. While the plaintiff was engaged in remedying this defect, car six came down from above, struck the plaintiff and knocked him to the bottom of the shaft, causing the injuries complained of. It was admitted that the defendant operated and controlled all the elevators in the building, and had general control of the elevator boys, all of whom were in the general employ of the defendant. It also was admitted that there was evidence for the jury of the plaintiff's due care and no question was made but that there was evidence for the jury of negligence on the part of the elevator boy, one Hyatt. Other evidence is described in the opinion.

At the close of the evidence the defendant asked the judge to make the following rulings:

- "1. On all the evidence the plaintiff is not entitled to recover."
- "3. On all the evidence the plaintiff assumed the risk of such an accident as happened."
- "4. If the jury believe that the hotel was at the time still

being constructed by the general contractor, and that the defendant company was allowed in it merely by sufferance and under no claim of right of possession upon its own part, then the jury must find that the plaintiff was a mere licensee in so far as the defendant was concerned, and that the defendant would not be liable for any injury caused to the plaintiff by the mere negligence of its agents or servants."

The judge refused to make any of these rulings and submitted the case to the jury. In the course of the judge's charge the plaintiff's counsel called the judge's attention to the plaintiff's contention that there was evidence that one Russell, the defendant's head bell-man, was told that the plaintiff was working under elevator number six and that Hyatt understood that the plaintiff was there. The judge then instructed the jury as follows: "I don't remember just what the testimony was, — but that Russell was head bell-man, that he had charge of the elevator boys, and that it was his duty to give notice to the elevator boys when the workmen were employed in the well, so that they should not be subjected to danger. If you find that is the evidence, and you find that Russell was negligent, and that the defendant was responsible, you might consider the negligence of Russell, if there was negligence." The defendant excepted to this portion of the charge.

The jury returned a verdict for the plaintiff in the sum of \$6,460; and the defendant alleged exceptions.

E. K. Arnold, for the defendant.

F. J. Carney, for the plaintiff.

RUGG, C. J. The plaintiff while in the exercise of due care was injured through the negligence of an elevator boy named Hyatt in the employ of the defendant. The verdict of the jury has settled these points and it is not contended that they are unsupported by the evidence.

1. The first contention of the defendant is that at the time of the accident Hyatt, although in its employ, was temporarily the servant of others. This is predicated on evidence that one Barney, representing the general contractor for the construction of the building, had requested that the elevator boys be at the building upon the day of the accident for the use of the contractor and subcontractors in putting the finishing

touches on the building. But the building was under lease to the defendant. It had been at least in partial possession for some time, installing its furniture and supplies and getting ready to open the hotel to the public. At least one of the three elevators in the shaft where the plaintiff was injured was operated for the benefit of passengers, and the journey which caused the injury to the plaintiff was for the purpose of carrying employees of the defendant for the performance of their duties as such. The instructions, based upon *Coughlan v. Cambridge*, 166 Mass. 268, 277, correctly left the decision of this matter to the jury.

2. The request of the defendant that as to it the plaintiff was a licensee, provided the jury believed that the hotel was at the time still being constructed by the general contractor and that the defendant was allowed in it by sufferance and under no claim of right, was denied rightly. Its abstract soundness is open to grave doubt. But it was not applicable to any phase of the evidence. The building was at the time leased to the defendant, which was in actual occupation in the preparation for inviting the patronage of the public. There is nothing in the exceptions to indicate that the trial proceeded on the theory that the possession of the defendant was any other than under its lease and under a claim of right. It would have tended only to confusion to have given any instructions touching a subject not open on the evidence.

3. If it be assumed that the point, whether the plaintiff was a licensee of the defendant in the use of the elevator well at the time of his injury, was raised fairly, there was no error in its treatment by the trial judge. The plaintiff was at the place of the accident in the performance of a duty required by the contract of his employer with the general contractor. In this respect the building was not quite completed. In the absence of further evidence, it is plain that he was at his post rightfully and not by sufferance of the defendant. He was engaged in making the hotel suitable for occupancy.

4. There was no error in submitting to the jury the question of the negligence of Russell, the head bell-man for the defendant. The judge did not undertake to state the evidence with accuracy in this regard, but simply referred to it in a general way as being sufficient to support a finding of negligence provided it should

be found to show that Russell had charge of the elevator boys and that it was his duty to warn them when workmen were employed in the wells, so that they might not be subjected to danger. There was evidence to this effect.

5. It could not have been ruled as matter of law that the plaintiff assumed the risk of Hyatt's negligence. That was a question of fact to be decided upon all the evidence. *Frost v. McCarthy*, 200 Mass. 445, 448. They were not fellow servants. *Hasty v. Sears*, 157 Mass. 123, relied on by the defendant, plainly is distinguishable.

6. The general request that a verdict be directed for the defendant ought not to have been granted. In all its material aspects, the inferences to be drawn from evidence in some respects conflicting presented questions of fact to be submitted to the consideration of the jury.

Exceptions overruled.



FRANCIS PEABODY, JR., & others, trustees, *vs.* CITY OF BOSTON.

SAME *vs.* SAME.

Suffolk. November 20, 1914. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Way, Public: extent of easement. Washington Street Tunnel. Easement. Damages, For property taken or impaired under statutory authority. Constitutional Law.

The public easement of travel in city streets, the fee in which is owned by the owners of the adjacent land, permits the construction by the public authorities of subways and tunnels for public travel beneath the surface of the street without the giving of compensation to the landowners beyond that which was given when the street originally was laid out; and the exercise of such right a long time after the original laying out of the street infringes no constitutional right of the landowner.

The owner of land beneath a public street has a right to use such land in any way not inconsistent with the public easement of travel; but, even a long time after the street originally was laid out, the public, without paying to the landowner any compensation beyond what he was paid when the street was laid out, may construct a subway or tunnel beneath the street for the purposes of public travel although thereby the owner is deprived of all use of the land.

Neither at common law nor by St. 1902, c. 534, § 8, has the owner of land on Washington Street in Boston, where none of his land was taken, any right of compensation for damage caused by the building of the Washington Street tunnel in the half of the street of which he owned the fee subject to the public easement of travel, although he was caused expense by being required to remove boilers and other structures placed by him beneath the street and was deprived of further use of his land beneath the street.

PETITIONS, filed respectively on April 13 and September 21, 1907, under St. 1902, c. 534, for the assessment of damages alleged to have been caused by the construction of the Washington Street tunnel in Boston.

In the Superior Court the cases were tried before *Stevens, J.* The evidence is described in the opinion. After answers were returned by the jury to certain special questions submitted to them, the judge ordered verdicts for the respondent and reported the cases for determination by this court.

M. J. Dwyer, for the petitioners.

G. A. Flynn, for the respondent.

RUGG, C. J. The petitioners owned the Devonshire Building and the lot on which it stood, at the corner of Washington, State and Devonshire Streets in Boston and fronting on all three of these streets. They seek to recover damages caused to this estate by the construction of the Washington Street tunnel. No land has been taken from the petitioners. The foundations of the building, so far as necessary, were supported by concrete walls built underneath them by the Boston transit commission without expense to the petitioners and the jury have found that they have sustained no damage on this account. But they owned the fee of the land adjacent to their building to the centre of Washington Street and had excavated and used space under the sidewalk in connection with their building. The construction of the subway not only has appropriated a portion of this space, but has rendered necessary the removal of boilers and other appurtenances to another part of their basement, whereby they have been occasioned expense. All the tunnel constructions so far as now material are within the limits of Washington Street.

The point to be decided is whether the petitioners are entitled to recover damages on this ground.

It is plain that, if there were no statute governing the subject, the petitioners would have no standing. The public acquired

the right to use the land, within the boundaries of the taking of the easement of travel, for all reasonable means of transportation for persons and commodities which the advance of civilization may render suitable for a highway. The fee of the land remains in the landowner, who may use it in any reasonable way not inconsistent with the paramount right of the public easement which is coextensive with the limits of the highway. When the needs of the public for the purpose of travel increase, they are superior and the landowner must withdraw even to the extent of being quite excluded. *Commonwealth v. Morrison*, 197 Mass. 199, 203. *Lentell v. Boston & Worcester Street Railway*, 202 Mass. 115. Changes of grade or raising or lowering the surface of highways made by public authority for the purposes of public travel afford no cause of action to an abutting landowner apart from statute. Included in the same public right is the subterranean use of the streets for travel. *Sears v. Crocker*, 184 Mass. 586. All damages for these and such like uses were included in the assessment of compensation for the original laying out of the highway. No constitutional right of the abutting landowner is invaded by the exercise of the rights acquired by the public but suffered to lie dormant for a time. *Callender v. Marsh*, 1 Pick. 418. *Hyde v. Boston & Worcester Street Railway*, 194 Mass. 80.

The petitioners contend that they are given right to damages by St. 1902, c. 534, the material portions of which are in a footnote.* The power conferred upon the commissioners by § 6 is

* "Section 6. The commission may for the purposes of this act use public ways and lands without compensations therefor. . . ."

"Section 8. The commission shall determine and award the damages sustained by any person by reason of property taken or injured by the commission under authority of this act, except public ways or lands, and may agree with any person as to the amount to be paid as damages sustained by him for any property so taken or injured, which damages the city shall be liable to pay. . . ."

"Section 9. The commission may order the temporary removal or relocation of any surface tracks, and the temporary or permanent removal or relocation of any conduits, pipes, wires, poles or other property of any person or corporation, which it deems to interfere with the construction or operation of the tunnel or subway, and shall grant new locations for any such structures so removed or relocated. Such orders, to the extent specified therein, shall be deemed a revocation of the right or license to maintain such tracks, conduits,

comprehensive and unqualified. Its natural signification is to clothe them with the authority to exercise the entire right obtained by the public when the easement for a public way was acquired. That this was the meaning intended is confirmed by the terms of § 8, whereby the commission is required to award damages sustained by reason of property taken or injured "except public ways or lands." The provision of § 9 which requires all structures "or other property of any person or corporation" in public ways or land which the commission deems to interfere with the construction or operation of the tunnel to be removed without expense to the city, tends to the same construction.

Giving to the words employed in the statute their common and unconstrained meaning, it seems clear that the Legislature tried to confer upon the commission the right to do that which rightfully it might do within the streets without being under liability to owners of the fee or licensees therein who had appropriated to their own uses parts of the highway not theretofore needed for the exercise of the easement of travel.

Comparison of § 8 of the statute here in question with St. 1894, c. 548, §§ 26 and 34, as amended by St. 1895, c. 440, § 1, is significant of a change of legislative purpose. That statute contained no exception as to highways, and it was held in *Fifty Associates v. Boston*, 201 Mass. 585, that under those statutes an abutting landowner who suffered injury, although none of his land was taken, was entitled to recover damages, following in principle *Hyde v. Fall River*, 189 Mass. 439. Manifestly the Legislature designed to accomplish a different end by the statute now under consideration. The case at bar is distinguishable from those decisions. It falls into the class illustrated by *Callender v. Marsh*, *ubi supra*, *Howe v. West End Street Railway*, 167 Mass. 46, and

pipes, wires, poles or other property, and the owner of any such structures in public ways or lands shall comply with such orders without expense to the city. If such owner shall fail to comply with the order of the commission within a reasonable time, to be fixed in the order, the commission may discontinue and remove such tracks, conduits, pipes, wires, poles or other property, and may relocate the same, and the cost of such discontinuance, removal or relocation shall be repaid to the city by the owner. No such discontinuance, removal or relocation shall entitle the owner of the property thus affected to any damages on account thereof."

Underwood v. Worcester, 177 Mass. 173. See *New England Telephone & Telegraph Co. v. Boston Terminal Co.* 182 Mass. 397.

Judgment on the verdict.

W. V. N. POWELSON & another vs. TENNESSEE EASTERN
ELECTRIC COMPANY & others.

Suffolk. November 20, 1914. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Corporation, Stockholder's right to inspection of books, Voting trust. Equity Jurisdiction.

A stockholder of a Massachusetts corporation, in availing himself of the privilege given by St. 1903, c. 437, § 30, to inspect the stock and transfer books of the corporation, has a right to have his attorney with him to take part in the inspection, and they have a right to make such written memoranda or copies as they require.

Whether one of three persons who hold shares of the capital stock of a Massachusetts corporation solely as trustees under a voting trust, by reason of such ownership and of the fact that he is the owner of a large number of the voting trust receipts, may maintain a bill in equity under St. 1903, c. 437, § 30, to compel the corporation and its officers to allow him to examine its stock transfer books, was not decided in this case, in which a stockholder in his own right had been allowed to intervene as a party plaintiff.

Whether a stockholder of a Massachusetts corporation is entitled, under St. 1903, c. 437, § 30, to examine the stock and transfer books of the corporation irrespective of his motive or purpose in so doing, was not decided in this bill in equity to enforce such a right, because, on an inspection of the record, it seemed reasonable to infer that the single justice who heard the case was satisfied that the plaintiff was acting in good faith.

BILL IN EQUITY, filed in the Supreme Judicial Court on August 27, 1914, seeking to compel the defendant corporation and its officers to permit the plaintiff to inspect its stock and transfer books.

The Tennessee Natural Development Company, seeking the same relief, was allowed to intervene.

The case was heard by *Hammond, J.* The following facts were found by him:

The counsel for the defendants contended that the order prayed for in the original petition should not issue because, as they contended, the plaintiff was not a stockholder of the defendant company, and because his motive in asking for an inspection of the stock and transfer books of the company was an improper one. They also contended that the order prayed for by the intervening petitioner should not issue because, as they contended, the intervening petitioner was a corporation dominated and controlled by the plaintiff Powelson, and that it was seeking to acquire the information asked simply in order that Powelson might make use of it.

"It was contended, as alleged in the defendants' answer, that by reason of previous litigation between the petitioner and this company, as detailed in the answer, the bill was brought for the purpose of spite and revenge. It was orally contended by counsel for the defendants, who offered to show the same, that the bill was also brought with the intent to injure the defendant Warner and his partners in their standing with their customers, who were the purchasers of practically all of the preferred stock of the defendant company.

"It was admitted by the counsel for the defendants that the defendant company is a Massachusetts corporation with an authorized capital stock of 22,500 shares of the par value of \$100 each; that of an authorized issue of 7500 shares of preferred stock of a par value of \$100 each, 6000 shares have been issued and sold by Warner, Tucker & Company to about two hundred of their customers, who still hold the same; that of an authorized issue of 15,000 shares of common stock of the par value of \$100 each, 13,400 shares have been issued; that the intervening petitioner was the owner, on the books of the company, of 10 shares of the common stock of the defendant company, for all of which it had paid full value; that, except for these 10 shares, all the common stock of the defendant company stood on the books of the defendant company in the name of three voting trustees, in accordance with the terms of the voting trust agreement* annexed to the answer; that the plaintiff was one of said voting trustees of this common stock, and the owner of 3745 voting trust receipts

* This document was not in the record before this court.

of the par value of \$100 each, for all of which he had paid full value, and that these voting trust receipts represented the beneficial interest in 3745 shares of the common stock of the defendant company; that separate demands in behalf of the plaintiff and the intervening petitioner were duly made at the office of the company, during business hours, to inspect the stock and transfer books of the company by persons duly authorized thereto by them, and that both such demands were refused.

"The counsel for the defendants further stated that the defendants were perfectly willing that the plaintiff and the intervening petitioner should inspect the stock and transfer books containing a complete list of all stockholders, with their residences and the amount of stock held by each, providing that they would not make or take away any copies thereof.

"Upon consideration of the matter, and notwithstanding all that had been said by the counsel for the defendants, which I understood to be, in substance, — that by reason of previous litigation and trouble between Powelson and this company, Powelson desired to change the administration of the company, and desired the prayers of the bill granted for that purpose, which the counsel for the defendants thought an improper motive, and that Powelson further desired it for the purpose of spite and revenge, — I ruled that both the plaintiff and the intervening petitioner should have the right to make the inspection prayed for, and that, if they could not hold what they found by the full force of memory, they should have the right to such aids in the way of written memoranda as they required."

The single justice reported the case to the full court for determination.

The case was submitted on briefs.

J. L. Hall & S. C. Rand, for the plaintiffs.

L. A. Ford & R. H. Holt, for the defendants.

DE COURCY, J. This is a bill in equity under § 30 of the business corporation law, St. 1903, c. 437, seeking an inspection of the stock and transfer books of the defendant corporation. It is provided in that section that "The stock and transfer books of every corporation, which shall contain a complete list of all stockholders, their residences and the amount of stock held by each, shall be kept at an office of the corporation in this Commonwealth

for the inspection of its stockholders." Liability for damage caused by a refusal to exhibit the books, etc., is specified; and the section concludes as follows: "The Supreme Judicial Court or the Superior Court shall have jurisdiction in equity, upon petition of a stockholder, to order any or all of said copies, books or records to be exhibited to him and to such other stockholders as may become parties to said petition, at such a place and time as may be designated in the order."

The preliminary objection that Powelson, as one of the three voting trustees, cannot exercise the rights of a stockholder under the statute need not be considered. It is admitted that the intervening petitioner, the Tennessee Natural Development Company, was the owner of ten shares of the common stock of the defendant corporation, that it duly made a demand to inspect the stock and transfer books of the Electric Company, and that the demand was refused. It has become a party to the suit and can invoke the statute. Hereinafter it will be referred to as the plaintiff.

It is settled that the common law right of a stockholder to inspect the books of a corporation is a qualified and not an absolute right. *Varney v. Baker*, 194 Mass. 239. Where the right has been given by statute it has been decided in many jurisdictions that unless the statute imposes restrictions or limitations, the right is absolute, and the motive or purpose of the stockholder in seeking to exercise it is not the proper subject of judicial inquiry. *Foster v. White*, 86 Ala. 467. *Hobbs v. Tom Reed Gold Mining Co.* 164 Cal. 497. *Venner v. Chicago City Railway*, 246 Ill. 170. *White v. Manter*, 109 Maine, 408. *Henry v. Babcock & Wilcox Co.* 196 N. Y. 302. *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189. *Kimball v. Dern*, 39 Utah, 181. *Holland v. Dixon*, 37 Ch. D. 669. *Davies v. Gas Light & Coke Co.* [1909] 1 Ch. 708. 20 Ann. Cas. 612, note. Ann. Cas. 1913 E, 173, note.

The scope of our statute is narrower than the common law right of inspection, as it deals only with the records, stock and transfer books. The present application is confined to the stock and transfer books and is made for the alleged purpose of obtaining a complete list of the stockholders and their residences. The right of a stockholder to obtain this information has been recognized by the Legislature of this Commonwealth since 1858.

See St. 1858, c. 144; Gen. Sts. c. 68, § 10; Pub. Sts. c. 105, § 21; R. L. c. 109, § 32. And by R. L. c. 110, § 51, every business corporation, excepting banks, steam and street railway and insurance companies, was required to make and file annually in the office of the Secretary of the Commonwealth a certificate, stating, among other things, the name of each shareholder and the number of shares standing in his name. Such certificates were considered as recorded, and were kept in book form convenient for reference. See 1 Opinions of the Attorneys General, 278. The language of St. 1903, c. 437, § 30, and the history of the legislation on the subject indicate that the stockholder's right to know the names, addresses and extent of interest of his associates in the common enterprise, who with him must elect directors to manage the business of the company, is an absolute right.

As we construe the report, however, it is not necessary to decide whether a stockholder is entitled to the relief here asked for regardless of his motive or purpose. The single justice, after hearing the parties, ruled that the plaintiff should have the right to make the inspection prayed for. It is reasonably to be inferred that he was satisfied that the plaintiff was acting in good faith. The fact, if it is a fact, that Powelson, by reason of previous litigation, desires to change the administration of the company, and has instituted these proceedings with that in view, is entirely consistent with an honest belief that a change in management and policy will advance the interests of the corporation and his own rights as a stockholder. *Varney v. Baker*, 194 Mass. 239. *State v. Donnell Manuf. Co.* 129 Mo. App. 206. *Richardson v. Swift*, 7 Houst. (Del.) 137. *Phoenix Iron Co. v. Commonwealth*, 113 Penn. St. 563. *State v. Monida & Yellowstone Stage Co.* 110 Minn. 193, 200.

The right of the plaintiff to be represented by a duly authorized attorney as incidental to the right of inspection has not been questioned. See *White v. Manter*, 109 Maine, 408; *Foster v. White*, 86 Ala. 467; 10 Cyc. 958, note. And the ruling of the single justice authorizing the plaintiff to make written memoranda or copies of the stock and transfer books is in accord with sound reason and authority. *People v. Consolidated National Bank*, 105 App. Div. (N. Y.) 409. *Cincinnati Volksblatt Co. v. Hoff-*

meister, 62 Ohio St. 189. *State v. Bienville Oil Works Co.* 28 La. Ann. 204. *Henry v. Babcock & Wilcox Co.* 196 N. Y. 302. *State v. German Mutual Life Ins. Co.* 152 S. W. Rep. 618. *Mutter v. Eastern & Midland Railway*, 38 Ch. D. 92.

The order for inspection is to issue as prayed for. The details as to time and manner will be designated in the order as settled by a single justice.

Ordered accordingly.

J. H. SHERBURNE, trustee, *vs.* ALTON C. LITTEL & others.

Middlesex. December 7, 1914. — February 27, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Trust, Construction. Equity Jurisdiction, Bill for instructions. Will. Stare Decisis. Res Judicata.

The decision in *Sherburne v. Sischo*, 143 Mass. 439, affirmed.

Where, about twenty-eight years ago in a suit in equity by the trustee under a certain will, in which instructions were sought as to the meaning of a certain clause of the will and all living persons beneficially interested had had an opportunity to be heard and a guardian *ad litem* for persons who were not in being and who might become interested had appeared and contested, this court rendered a decision which has been acted upon by the trustee and his successor in a number of payments under the clause in question and has been followed and cited in later decisions of this court in other suits, such decision should not be reversed nor modified in another suit in equity by a succeeding trustee under the same will for instructions as to the meaning of the same clause.

Whether all the parties in the present suit were represented in the former suit in such a way that the decision and decree in the former suit made *res judicata* the issues raised in the present suit, was not determined, this court preferring to rest its decision in the present suit upon the soundness in principle of the previous decision.

Where an absolute estate is given by a paragraph of a will in clear and unmistakable language, it cannot be cut down to a less estate by subsequent words in the same paragraph inconsistent therewith. Such subsequent words are treated as of no effect.

CROSBY, J. This is a bill in equity for instructions brought by the trustee under the will of Jacob Foss and is before this court on appeal from a decree of the Probate Court by the defendants

Littel who are the heirs at law of William A. Foss, they being the only children of his deceased daughter.*

The testator died in 1866, leaving at that time thirty-four nephews and nieces, among whom were William A. Foss and Lucy C. Williams. William A. Foss died in 1893, and Lucy C. Williams died on August 10, 1913.

The question presented relates to the construction of the thirty-fourth clause † of the will, which provides for the disposition of the rest and residue of the estate. The construction of this clause of the will was before this court in *Sherburne v. Sischo*, 143 Mass. 439, and is governed by it. That was a bill in equity for instructions as to the same clause in the will. The plaintiff in that case was the sole trustee under the will and after his decease the present plaintiff was duly appointed and is now the sole trustee under the will.

In 1885, Lucy D. Sischo, a niece of the testator, died leaving Peninnah F. Sischo, her only child, fifteen years of age, surviving. It was contended that the income only of the trust fund was to be paid to the heirs until all the nephews and nieces had

* The case was reserved for the full court by *Hammond, J.*

† This clause was as follows: "Thirty fourth. All the rest and residue of my estate, real, personal and mixed, I give devise and bequeath to my nephews and nieces in severalty, to share and share alike, except William A Foss my brother Luther's oldest son. And I hereby direct, that my Executors above named pay the same to my said Nephews and Neices in equal proportions whenever at the end of each six months there shall be a sufficient sum to divide two hundred dollars or more, to each, except William A Foss aforesaid, until the whole of my estate is disposed of, as follows, to wit: To those that have severally arrived at the age of twenty one years, one half of their portion: and to the Guardians of those not arrived at the age of twenty one years, one half of said minors' portion: the other half of said portions to be invested by my said Executors in some safe and permanent security or securities, as they shall think best, and be by them held in trust, for the benefit of my said nephews and nieces, the income of which, shall be equally divided between them during their lives, annually or oftener as my said Executors may think best according to the nature or source of said income, and at the decease of either of the said nephews and nieces, I give and bequeath such one half portion and interest on the trust fund to his or her legal heirs: and at the decease of all my nephews and nieces, I give and bequeath the principal of said trust fund to their legal heirs, including William A Foss heirs, my brother Luther's oldest son."

deceased, and then the principal was to be distributed. That contention was not sustained by this court, but it was held that the testator had excluded his nephew, William A. Foss, from the benefits of his will, and that as an absolute estate was given to the heirs of the nephews and nieces respectively upon the decease of such nephews and nieces, the gift could not be cut down to a less estate by subsequent words inconsistent therewith, and that therefore the trust fund held for the benefit of Lucy D. Sischo then should be paid to her daughter.

The defendants Littell claim that the heirs at law of William A. Foss became entitled to one thirty-fourth part of the trust fund at his death, which occurred in 1893, and that in computing the share to be paid to the heirs of Lucy C. Williams the plaintiff should allow for the payment of a share to the heirs of William A. Foss.

The difficulty with this contention is that this court, in *Sherburne v. Sischo*, held that neither William A. Foss nor his heirs were entitled to share in the trust fund. The decision in that case was rendered about twenty-eight years ago; and at the date of the death of Lucy D. Sischo there remained twenty-nine nephews and nieces, including William A. Foss, surviving.

An inspection of the original papers in that case shows that a final decree was entered by a single justice of this court, providing in part, "that the plaintiff pay to the said Peninnah F. Sischo . . . one twenty-eighth part of the principal of said trust fund now in his hands." This decree was assented to by all parties in being and by a guardian *ad litem* who was appointed by the court and represented persons not ascertained or not in being.

The decree clearly shows that in determining that one twenty-eighth part of the fund should be paid to the heir at law of Lucy D. Sischo, William A. Foss and those who might claim under him as his heirs were excluded from participation in any portion of the trust fund.

In *Sherburne v. Sischo*, it is plain that not only the question whether any portion of the principal of the trust fund was to be paid over to the heir of the deceased niece at that time was involved, but the question as to what portion of the trust fund was to be so paid was also a material issue and necessarily in-

volved in the determination of the questions raised. It cannot therefore be contended that the decision in that case or any part of it was merely dictum.

In the meantime the number of nephews and nieces living at the date of the death of Lucy C. Williams has been reduced to eleven, exclusive of William A. Foss or his heirs.

It would seem that, unless we are prepared to reverse the former decision rendered by this court as to the construction of the thirty-fourth clause of this will, the decree of the Probate Court must be held to be correct, and that the heirs of Lucy C. Williams should be paid one twelfth part of the principal of the trust fund; and that neither William A. Foss nor his heirs are entitled at the present time to any portion of, or have any interest in, the principal of the trust fund.

We are not disposed to question the correctness of the construction placed upon the clause in question by this court in *Sherburne v. Sischo*, the principle upon which that decision rests being that where an absolute estate is given by bequest or devise in clear and unmistakable language it cannot be cut down to a lesser estate by a subsequent provision inconsistent with the gift. *Bassett v. Nickerson*, 184 Mass. 169, 176. *Knight v. Knight*, 162 Mass. 460. *Joslin v. Rhoades*, 150 Mass. 301. *Kelley v. Meins*, 135 Mass. 231.

In *Bullard v. Chandler*, 149 Mass. 532, at page 536, this court, in affirming the soundness of this rule, cites as an authority therefor *Sherburne v. Sischo*, 143 Mass. 439. If we doubted the correctness of the construction heretofore placed upon this clause of the will by this court, we should hesitate to reverse it except for most impelling reasons. Since the former decision sixteen nephews and nieces have died, and after each such death the trustee, undoubtedly acting in accordance with the former decision, has made a division of the principal of the trust fund. To reverse that decision which has been acted upon by the trustee for a period of about twenty-eight years would without doubt result in confusion and uncertainty, which ought to be avoided except for urgent reasons. *Southard v. Southard*, 210 Mass. 347, 359.

During all the years that have elapsed since that decision was rendered, it has been followed and so far as appears never has been questioned by William A. Foss, or by his heirs, until this

time. It is contended by the heirs of Lucy C. Williams that the heirs of William A. Foss were represented in the former suit by a guardian *ad litem* who was appointed by order of the court, that therefore they were parties to that proceeding, and that the decision therein is as to them *res judicata*. There is much force in this contention, but we prefer to rest our decision upon the broad ground that the interpretation of the thirty-fourth clause of the will adopted in *Sherburne v. Sischo*, both upon principle and authority, is correct and should be followed and affirmed in this case.

The decree of the Probate Court should be affirmed and the case remanded to that court for further proceedings.

So ordered.

F. G. Goodale, for the trustee, stated the case.

A. T. Wright, for the defendants Alton C. and Ethel G. Littel.

C. C. Barton, Jr., for the defendant Etta P. Clark.

R. H. Wiswall, guardian *ad litem*, *pro se*.

MERCHANTS LEGAL STAMP COMPANY vs. WILLIAM SCOTT.

Suffolk. December 8, 1914. — February 27, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Trading Stamps. Contract, Validity. Monopoly. Restraint of Trade. Equity Jurisdiction, No enforcement of unlawful contract.

A corporation, which has issued trading stamps under contracts containing restrictions decided by this court in *Merchants Legal Stamp Co. v. Murphy*, ante, 281, to be illegal and void under St. 1908, c. 454, § 1, cannot maintain a suit in equity to restrain a person, who with knowledge of the terms of such contracts bought the plaintiff's trading stamps from customers of the plaintiff, from buying and disposing of such stamps, where the defendant is not shown to have engaged in any fraud, deception or unfair competition.

Whether a corporation that has issued trading stamps under contracts that are illegal and void under St. 1908, c. 454, § 1, can be compelled to redeem such trading stamps that have been acquired in violation of the unenforceable terms of its contracts, here was referred to as a question that was not before the court.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 20, 1914, by the same corporation which was the plaintiff in

Merchants Legal Stamp Co. v. Murphy, ante, 281, to restrain the defendant from transferring, buying, selling, dealing in or in any manner possessing or disposing of the plaintiff's trading stamps or trading stamp books.

The defendant's answer, among other matters, alleged that the plaintiff was maintaining an unlawful monopoly and that the contracts sought to be enforced by it were in restraint of lawful competition under St. 1908, c. 454, § 1.

The case was referred to Franklin T. Hammond, Esquire, as master, to whom the previous case mentioned above also had been referred. The only difference between the facts in this case and those in the previous case is pointed out in the opinion.

The case was heard by *Sheldon*, J., upon the defendant's exceptions to the master's report. The justice made an interlocutory decree, ordering that the defendant's exceptions be overruled and that the master's report be confirmed. Later by order of the same justice a final decree was made ordering that the defendant be "enjoined from transferring, buying, selling, dealing in, or in any manner possessing or disposing of the plaintiff's legal stamps or stamp books without the plaintiff's consent; and the defendant is directed to deliver to the plaintiff all legal stamps and stamp books belonging to the plaintiff now in the defendant's possession or control; and that the defendant pay to the plaintiff the sum of \$1, as nominal damages, suffered by the plaintiff in the premises, and the sum of \$18.46 as costs of suit, and that execution issue therefor." The defendant appealed.

J. A. McGeough, for the defendant.

S. L. Whipple, (*C. Connor* with him,) for the plaintiff.

BRALEY, J. The master's report and the inferences which fairly may be drawn therefrom do not disclose any material facts as to the nature and effect of the plaintiff's business different from those reviewed in *Merchants Legal Stamp Co. v. Murphy*, ante, 281, except that the defendant with knowledge of the terms of the contract instead of buying from the plaintiff has to a limited amount obtained stamps in exchange for goods from customers of the plaintiff who came into his store to trade.

But as the plaintiff, for reasons stated in the previous case, has adopted a form of contract, the deliberate purpose and effect

of which when put in operation is to stifle competition and restrain trading in these stamps by others, in violation of St. 1908, c. 454, § 1, the defendant, who is not shown to have engaged in fraud, deception or unfair competition, is not guilty of any actionable wrong.

The question whether the plaintiff can be compelled to redeem stamps acquired in violation of its contracts is not before us.

The decree for the plaintiff must be reversed, and a decree is to be entered dismissing the bill with costs.

Ordered accordingly.

DANIEL J. BROWN & others vs. BOSTON POLICE RELIEF ASSOCIATION.

Suffolk. January 11, 1915. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Boston Police Relief Association. Corporation, By-laws.

The provision of St. 1882, c. 78, amending the charter of the Boston Police Relief Association by authorizing an extension to retired members of the police force of the benefits to accrue upon the death of its members or of their wives, was permissive and allowed but did not compel the extension of the privilege.

Action by that association, at the same meeting at which it accepted the provision of the statute by amending its by-laws so as to permit those who had retired from the police force to continue their membership in the association, in voting to amend a by-law which formerly had provided that upon the death of the wife of a member the board of directors should cause a certain sum to be paid to the member, so that it read that "the board of directors, with the approval of the finance committee" should do so, was within its power under its charter and by-laws.

That by-law as thus amended means that the determination of the question whether such benefit shall be paid depends upon the direct affirmative sanction of the finance committee. While the finance committee in exercising the power so given to them would not be justified in acting in a whimsical or capricious manner in refusing sanction to the payment of the benefit, a refusal by them to authorize the payment of that benefit to any members who have retired from the police force is within their powers, and cannot be called whimsical or capricious.

RUGG, C. J. The defendant was incorporated by St. 1876, c. 16, for the purpose of assisting the families of its deceased

members and its members when sick or disabled, or upon the decease of their wives. Membership was confined to those who were members of the police department of the city of Boston. Its charter was amended by St. 1882, c. 78, so as to extend the benefits to accrue upon the death of members or their wives to retired members of the police force, subject among other provisos to compliance with its by-laws. Previous to the annual meeting of 1884, Article XIX of the by-laws read as follows: "Upon the death of the wife of a member of the corporation, the board of directors, shall cause to be paid to said member the sum of one hundred dollars." At that meeting this by-law was amended by inserting after the word "directors" the words "with the approval of the Finance Committee." At the same meeting Article I of the by-laws was amended so as to permit those who had retired from the police department to continue their membership in the association as provided in St. 1882, c. 78. Since that time the association has not expressly voted to extend to retired members the benefits to accrue by reason of the decease of their wives. The plaintiffs are retired members whose wives have deceased and they demand in this suit in equity the benefit provided by Article XIX of the by-laws.

St. 1882, c. 78, was permissive in its terms and allowed but did not compel the defendant to extend certain though not all of its benefits to retired members. At the same time this statute was accepted by the association, its by-law touching benefits to accrue on the death of the wife of a member was amended so that, instead of being definite and mandatory, its payments were made dependent wholly upon vote of the finance committee. All its other benefits remained mandatory as to occasion and time of payment and definite as to amounts. Since then it has been the settled policy of the association, as manifested by the votes of its finance committee, not to pay this particular benefit to a retired member upon the death of his wife, but to restrict this particular benefit to active members. All retired members have retained membership in the association subject to the provision that they should comply with the by-laws.

Although Article XIX of the by-laws is not couched in the clearest language, we interpret it to mean that whether the benefits shall be paid on the death of the wife of a member depends

upon the direct affirmative sanction of the finance committee. Doubtless their conduct in this regard could not be capricious. But the refusal to approve such payments to all retired members cannot be pronounced whimsical. The reason for this policy is set forth at length in correspondence annexed to the record, which shows that the expense to the association on account of the retired members has been much larger than that of the active members, and that it was the deliberate judgment of the officers of the defendant that the benefits for this class of its membership in view of its resources ought not to be increased. As matter of law this conclusion is within the powers of the defendant under its charter and by-laws.

The decree dismissing the bill was entered in the Superior Court* without costs, and it is

Affirmed without costs.

G. H. Tinkham, (S. E. Duffin with him,) for the plaintiffs.

W. J. Mayers, for the defendant.



MAYOR OF SOMERVILLE vs. JUSTICES OF THE POLICE COURT OF SOMERVILLE.

Suffolk. January 13, 1915. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Police, Retirement. Civil Service. Police, District and Municipal Courts.

Under St. 1911, c. 624, giving to "every person now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth," excepting the district police and members of the police departments of the metropolitan park commission and of Boston, "who is removed therefrom, lowered in rank or compensation, or suspended, or without his consent transferred from such office or employment to any other," a right, within ten days after the hearing provided for by St. 1904, c. 314, § 2, as amended by St. 1905, c. 243, to bring a petition in the police, district or municipal court within the district where he resides for a review of the action complained of, the Police Court of Somerville has jurisdiction to hear and determine a petition by a cap-

* By order of *Wait, J.*, by whom the case was heard upon an agreed statement of facts.

tain in the police department of that city for a review of the action of the mayor and aldermen in retiring him from active service and placing him on the pension roll at half pay under St. 1903, c. 428, as amended by St. 1909, c. 188.

RUGG, C. J. This is a petition brought by the mayor of Somerville to prohibit the justices of the Police Court of Somerville from acting further upon a petition of one Perry now pending in that court.* The salient facts are these: Perry was a captain in the police department of Somerville. In June the mayor and aldermen of Somerville retired him from active service and placed him on the pension roll, acting under St. 1903, c. 428, as amended by St. 1909, c. 188, in force in Somerville. That statute authorizes the mayor and aldermen, upon request of the chief of police, to retire any member of the police department under certain conditions not here of consequence, "if, in the judgment of said board, such member is disabled for useful service in the department," such retired member to receive as compensation one half the amount of his compensation while on active

* The petition for a writ of prohibition was heard by *Hammond, J.*, who ordered that the petition should be dismissed. The petitioner alleged exceptions.

St. 1911, c. 624, reads as follows: "Every person now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth, except members of the police department of the city of Boston, of the police department of the metropolitan park commission, and except members of the district police, whether appointed for a definite or stated term, or otherwise, who is removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other, may, after a public hearing, as provided for by section two of chapter three hundred and fourteen of the acts of the year nineteen hundred and four, as amended by chapter two hundred and forty-three of the acts of the year nineteen hundred and five, and within ten days after such hearing, bring a petition in the police, district or municipal court within the judicial district where such person resides, addressed to the justice of the court and praying that the action of the officer or board in removing, suspending, lowering or transferring him may be reviewed by the court, and after such notice to such officer or board as the court may think necessary, it shall review the action of said officer or board, and hear the witnesses, and shall affirm said order unless it shall appear that said order was made by said officer or board without proper cause or in bad faith, in which case said order shall be reversed and the petitioner be reinstated in his office. The decision of the justice of said police, district or municipal court shall be final and conclusive upon the parties."

duty. The retirement of Perry was made on the recommendation of the chief of police and the mayor after a public hearing by the board of aldermen. After his retirement Perry brought a petition in the Police Court of Somerville praying that this action of the mayor and aldermen be reviewed. The petition was brought under St. 1911, c. 624. The question to be decided is, whether that statute applies to a member of the police department retired upon a pension. Its material words are, — "every person now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth [with exceptions not now material] who is removed therefrom, lowered in rank or compensation, or suspended, or without his consent transferred from such office or employment to any other, may . . . bring a petition in the police" court within the district in which he resides, praying for a review of the action complained of.

The petitioner urges that the statute does not apply to a retirement upon a pension. The numerous recent statutes relating to pensions to which the petitioner calls attention show that the words "pension" and "retire" have been used many times in a special legislative significance as designating the act of pensioning. From this he draws the argument that the words employed in St. 1911, c. 624, do not and could not have been intended to comprehend a retirement upon pension, because, if such had been the purpose, special words, so frequently used in the pension acts, would have been inserted to that end. It is said further that the obvious design of the statute is to reinforce the civil service law and to prevent a circumvention of its provisions and spirit by an arbitrary exercise of executive power, and that the pension law has the same general purpose of promoting the efficiency of public service, and that hence there is no reason for making the process of pensioning subject to a review established with a different aim. These are considerations of weight and they have been put persuasively in behalf of the petitioner. But they are not quite convincing.

The language of St. 1911, c. 624, is comprehensive. It is accompanied by no words of exception or limitation. There is nothing to indicate that it was not intended to have the broad scope and the inclusive sweep and force which its natural meaning imports. The statute refers to "every person" who holds an

office like that held by Perry. No one is excepted save a class not here material. It confers the right to ask a review upon every such person who is removed, lowered in rank or compensation or transferred without his consent to another office or employment. The particular method is not specified by which such result must be effected in order that review may be asked. If any one of these consequences follows from the action taken by the executive officer or board, then the person upon whom that consequence falls has the right to petition for a review. That right is conferred in terms which are absolute and unequivocal. It does not depend upon any other condition than the single one of suffering some of the consequences set forth. When that outcome reaches him, then the right to petition for review accrues.

Without question the direct and immediate effect of retiring Perry upon a pension was to remove him from the list of active officers and place him on the retired list. Doubtless this was a removal from office in the sense in which those words are used in the statute. If it was not a removal from office, at least it was a transfer to another grade of service. Moreover, it reduced his compensation by one half. These results are among those precisely and accurately described in the statute as constituting grounds for the petition for review. If it had been the purpose of the Legislature to exclude results happening from the particular cause of retiring upon pension from those which entitle one to petition for the review, it would have been simple to express that purpose in unambiguous terms by making an unmistakable exception. It was done in St. 1909, c. 453, respecting members of the metropolitan police. We cannot read into the statute here under consideration an exception which is not there in terms and which does not arise by fair implication from examination of the subject matter or from other provisions of law.

The conclusion is that the respondents have jurisdiction to consider the petition for review brought by Perry and therefore the writ of prohibition cannot issue.

Petition dismissed without costs.

F. W. Kaan, for the petitioner.

E. P. Fitzgerald, for the respondents.

SUMMIT L. HECHT & others vs. BOSTON WHARF COMPANY.

JEREMIAH WILLIAMS & others vs. SAME.

JACOB F. BROWN & others vs. SAME.

Suffolk. January 13, 14, 1915. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Warehouseman. Act of God. Tide. Bailment. Proximate Cause.

An act of God, such as will relieve a warehouseman or bailee from liability for damage to or the destruction of goods entrusted to his charge for hire, may be defined as the action of an irresistible physical force not attributable in any degree to the conduct of man and not in reason preventable by human foresight, strength or care. By RUGG, C. J.

It cannot be ruled as matter of law that damage to goods stored in sheds of a warehouseman fronting on tidewater, which was caused by an extraordinarily high tide, was the result of an act of God, if the exercise of the ordinary prudence, foresight, care and skill reasonably to have been expected from a warehouseman in the performance of his duty would have prevented the damage.

In an action by the owner of certain wool for its damage by salt water in 1909 when stored in the warehouse of the defendant on the water front of Boston at the time of the highest tide that had risen in Boston Harbor for nearly sixty years, where it appeared that the tide that caused the damage rose to the height of fifteen and six tenths feet above Boston base, which was about two thirds of a foot below mean low tide, there was testimony of experts that before the tide that caused the damage the minimum height for the storage of wool near tide water was fifteen and six tenths feet above Boston base, and there was evidence that in a great storm in 1898 two of the three sheds of the defendant in which the plaintiff's wool was damaged were flooded by a tide that rose to a height of fourteen and ninety-four one hundredths feet, that thereafter the floors of these sheds were raised but that they afterwards had settled so that when the plaintiff's wool was injured there were places in each of the sheds as low as fourteen and ten one hundredths feet, fourteen and twenty-four one hundredths feet and fourteen and forty one hundredths feet above Boston base, that these levels were lower than the recorded heights of a number of previous tides, that records of the tide heights in Boston Harbor were available in the city engineer's office, had been published in that officer's reports for a number of years and had been referred to in other public records. *Held*, that there was evidence for the jury of negligence on the part of the defendant in the performance of its contract as warehouseman or bailee of the wool.

A wool dealer by storing wool for a number of years in the sheds of a warehouseman on the water front of Boston, without objecting to the level of the floors of the sheds, does not assume the risk of damage to the wool from an unusually high tide, damage from which could be avoided by raising the floor level of the sheds or making them to some degree waterproof, such dealer having the right

to assume that the warehouseman will perform his duty by using due care for the safety and protection of the goods stored.

A dealer, who stored with a warehouseman certain goods which were damaged by reason of negligence on the part of the warehouseman, in an action at common law against the warehouseman for such damage to the goods cannot recover for damage to a part of the goods which, when they were fully identified by definite marks, were sold by him to a customer before the damage occurred, the bailor having no relation of trust toward the buyer.

THREE ACTIONS OF CONTRACT OR TORT by different plaintiffs against the Boston Wharf Company, a corporation carrying on the business of a warehouseman, for damage to wool belonging to the several plaintiffs and stored in the sheds of the defendant adjoining the Fort Point Channel in the part of Boston called South Boston by reason of sea water entering the sheds during a high tide on December 26, 1909. Writs dated December 21, 1910.

The cases were referred to Charles E. Shattuck, Esquire, as auditor, who made a finding in favor of the plaintiffs. Later the cases were tried together before *Fessenden*, J. The jury took a view of the premises. The plaintiffs introduced in evidence the auditor's report and the exhibits referred to therein and also the oral testimony of five witnesses. The defendant called fourteen witnesses who testified in its behalf. The evidence is described in the opinion.

At the close of the evidence the judge required the plaintiffs to elect whether they would go to the jury upon the count in contract or upon the count in tort in each declaration, and they all elected to rely upon the count in contract. This count in each of the declarations alleged that the defendant was engaged in the business of a public warehouseman for hire at Boston, and, in consideration of the plaintiffs entrusting it with the care and custody of various large and valuable quantities of wool and in consideration of the plaintiffs undertaking to pay compensation for such care and custody and all other proper charges thereon, the defendant undertook and faithfully promised the plaintiffs to take due and proper care and custody thereof in all ways while it was in the possession of the defendant; that the plaintiffs performed all things by them to be performed, and all conditions precedent to performance on the part of the defendant; yet that the defendant, while it so had the care and custody of the

wool, took so little and such bad and improper care thereof that on December 26, 1909, large portions of the wool were wholly and completely destroyed and other large portions of it were damaged, and the remainder was rendered much less salable and much less fit for commercial purposes.

At the close of the evidence the defendant asked the judge to make the following rulings (besides others which were given by the judge as instructions to the jury):

"1. The jury must return a verdict for the defendant.

"2. The facts found in the auditor's report do not warrant a verdict for the plaintiffs.

"3. Upon the undisputed facts the high tide of December 26, 1909, amounted in law to an 'act of God.'"

"5. The evidence does not warrant a finding that the damage to the wool was caused solely by the negligence of the defendant."

"7. The evidence does not warrant a finding that the defendant failed to exercise ordinary care with reference to the wool."

"9. The defendant was not required to provide against an unprecedented emergency.

"10. The care of the defendant is to be determined upon the basis of its knowledge and experience prior to this event, and what the situation then seemed to call for."

"13. The plaintiffs cannot recover unless they have themselves exercised due care in the premises.

"14. If the plaintiffs knew where their wool was being kept and acquiesced for a long time in its being kept there they cannot now recover upon the ground that it was negligence to keep it in that place.

"15. If the plaintiffs knew for a long time where their wool was being kept and made no objection to the place, that is evidence upon the question whether the defendant was negligent in keeping it there.

"16. One who knows for years where his property is being stored, makes no objections to its being stored there, and keeps sending there property of the same kind which he knows is being put in the same place, cannot recover upon the ground that the place is an unsuitable one.

"17. Damages are not recoverable from a warehouseman, a bailee for hire, because of injury to goods stored through the

unfitness of the warehouse as a place of storage, where the bailor has equal opportunities with the bailee of knowing whether his goods are liable to injury by storage in an unsuitable place.

"18. When the bailor knows the place where and the manner in which the goods deposited are to be kept, he must be presumed to assent in advance that his goods shall be thus treated, and if, under such circumstances, they are damaged or lost, it is by reason of his own folly or fault, and he cannot recover."

"24. If an 'act of God' was the direct and proximate cause of the damage the defendant is not liable.

"25. If an 'act of God' was a direct and proximate cause of the damage the defendant is not liable."

"27. The evidence does not warrant a finding of more than nominal damages.

"28. If the plaintiffs are entitled to recover, the measure of damages is the difference between the fair market value of the wool as it lay in the sheds just before the tide reached it and its fair market value as it lay in the sheds just after the tide reached it.

"29. In determining its value just before the tide reached it, its situation with reference to the rising flood, the peril to which it was then exposed, and the possibility of saving it on that Sunday, are all to be taken into account.

"30. In determining the value of the plaintiffs' wool immediately before it was damaged, the jury must take into account the fact that it was then lying within reach of a tide, rising steadily and inevitably to a height beyond any which the plaintiff should reasonably anticipate, such as to constitute an 'act of God,' which tide would, within a few moments, inevitably submerge and injure the wool and that there was no possibility of removing it."

The judge submitted the cases to the jury and also submitted to them the following question:

"Ought the defendant in the exercise of reasonable care to have stored the wool above the height to which the water rose December 26, 1909?"

To the specific question above quoted the jury answered "Yes." They returned a verdict for the plaintiffs in each of the cases, in the case of Hecht and others in the sum of \$4,330.04, in the case

of Williams and others in the sum of \$324.25, and in the case of Brown and others in the sum of \$23,908.20. The defendant alleged exceptions in each of the cases.

IN THE CASE OF Hecht and others it appeared that the number of packages of wool of those plaintiffs stored with the defendant and damaged by sea water was three hundred and eighty-nine, and that of these eighty-eight bags had been sold to certain manufacturers at the time the damage was sustained but had not been delivered and remained in the defendant's sheds; and in the case of Brown and others it appeared that the whole number of packages of wool stored with the defendant and consequently injured was fifteen hundred and eighty-one and that of these four hundred and thirty-four bags had been sold to certain manufacturers before the damage was sustained but had not been delivered and remained in the defendant's sheds. In these two cases the plaintiffs contended that they were entitled to recover, not only for the damage to the wool still owned by them, but also for the damage to the part of the wool that they had sold, holding the money so recovered in trust for the purchasers of the wool. The judge refused to submit to the jury the question of the defendant's liability to the plaintiffs for the damage done to the bags of wool which had been sold, but submitted to the jury the question of the defendant's liability for the damage done to the unsold portion of the goods. He instructed the jury that the plaintiffs had not suffered any damage in regard to the wool that they had sold. The plaintiffs in these two cases alleged exceptions.

T. Hunt, (F. W. Bacon & O. T. Russell with him,) for the defendant.

D. A. Ellis, (S. M. Whalen with him,) for the plaintiffs.

RUGG, C. J. These are actions of contract wherein the plaintiffs seek to recover damages caused by the wetting with salt water of wool severally stored by them with the defendant, a warehouseman, on the water front in Boston. The direct means of the injury was the tide of December 26, 1909, which rose to such a height as to come into the sheds of the defendant, where the wool of the plaintiffs was stored, to a depth of several inches.

No question now is made as to the fact of damage. The main

contention of the defendant is that this tide was of such an extraordinary character as to amount to an "act of God" within the meaning of that phrase in the law. In its juridical sense an act of God may be defined as the action of an irresistible physical force not attributable in any degree to the conduct of man and not in reason preventable by human foresight, strength or care. Perhaps no definition could be framed in terms comprehensive enough to include every state of facts, but this is sufficient for the present cases. See *The Majestic*, 166 U. S. 375, 386, and 1 Corpus Juris, 1172 *et seq.*, for other definitions. Tides are manifestations of the forces of nature quite beyond the power of man to control. Human agency does not in any degree enter into their creation, their flood or their reflux. In this sense tides always are the act of God, for which man is not responsible. When damages are sought at law in such a connection, the test of liability of a defendant upon whom a duty is cast, is whether the injury caused by the tide is an inevitable accident due wholly to the violence of the natural phenomenon, and not referable in any degree to the participation of man by unreasonable failure to anticipate danger, to put forth appropriate preventive measures or protective instrumentalities, or to employ rational means to ward off the probable consequences of the event. The human element enters into damages resulting from a cause like a high tide only in omission seasonably to be vigilant to avert the disaster or to mitigate its consequences by the use of such expedients and safeguards as reasonably might be expected under all the circumstances. Through failure in this respect man may concur as a contributing proximate cause with the forces of nature. But the use of the means to which prudent and careful persons in the same line of business ordinarily have recourse is all that can be required. If, having done this, a defendant is overpowered by storm or tide or flood, he is free from liability. The highest ingenuity of the intellect is not demanded. Nothing more can be exacted than such wisdom and prevision as the ordinary man would have manifested to avoid a hazard or forestall a danger of which some warning actually had been given by previous experience or fairly would be disclosed by the application of sound judgment to an observation of general climatic conditions, prevailing customs and all available sources of in-

formation naturally to be resorted to by a reasonable man. *Nugent v. Smith*, 1 C. P. D. 423, 438. *Nichols v. Marsland*, 2 Ex. D. 1. *Gray v. Harris*, 107 Mass. 492. *Cork v. Blossom*, 162 Mass. 330, 332.

The precise point to be determined in the cases at bar is whether this particular tide was of such an extraordinary height that the resulting mischief would not have been guarded against by the prudence, foresight, care and skill reasonably to have been expected of the defendant in the performance of its duty as warehouseman.

The determination must rest upon a consideration of all the facts which the defendant within reason might have been required to know in the careful conduct of its business before this particular tide. It cannot be held to the exercise of a degree of sagacity which a reasonable warehouseman using due caution for the preservation of goods at the present time deposited with him, in the light of the experience gained from that tide, now would put forth but would not have thought of practicing before that event. The legal obligation of the defendant was to use the ordinary care of the man of common prudence in keeping the kind of goods deposited with it, in view of the facts accessible to and likely to be considered and acted upon by a reasonable person before the event complained of. *Willett v. Rich*, 142 Mass. 356. *Maynard v. Buck*, 100 Mass. 40, 47. *Murray v. International Steamship Co.* 170 Mass. 166. This is the same rule put in equivalent words as a requirement to exercise the care of "a reasonably careful owner of similar goods" in the management of his own concerns, and an exoneration from liability for "loss or injury to the goods which could not have been avoided by the exercise of such care." The warehouse receipt act (St. 1907, c. 582, § 22). *Sullivan v. Scripture*, 3 Allen, 564, 565. *Maynard v. Buck*, 100 Mass. 40, 47. Stated broadly, the principles of law respecting liability for damages arising from high tides are no different from those which govern liability flowing from different natural phenomena and the manifold other conditions constantly presented in every-day affairs. The test is whether the due care of the reasonable man under all the circumstances has been exercised.

The facts in the cases at bar must be examined to determine

whether as matter of law it could have been found that the defendant failed in the performance of this duty.

There was an auditor's finding in favor of the plaintiffs. Unless the facts stated in the report were not sufficient to support the conclusion, or were so inconsistent in themselves as to neutralize each other, or were overcome by other evidence, that was evidence sufficient to warrant a verdict by the jury in favor of the plaintiffs. *Fair v. Manhattan Ins. Co.* 112 Mass. 320, 331. *Newell v. Chesley*, 122 Mass. 522. *Fisher v. Doe*, 204 Mass. 34.

The elemental facts were not very much in dispute and might have been found to be as follows: This tide was described by witnesses as extraordinarily high. The height reached by it was fifteen and six tenths feet above the arbitrary level in common use in the neighborhood, known as Boston base, which was about sixty-four one hundredths of a foot below mean low tide. This height had been exceeded slightly by the tide of 1851, which destroyed Minot's Ledge Light House. There were also tides higher than fifteen feet in 1830 and in 1847, and on seventeen other occasions from 1850 to 1905 the tide had risen to fourteen feet or more. The tide in question was three and eighty-six one hundredths feet above its predicted height. This was attributed to an accompanying severe storm, low barometer and a north-east wind of great velocity. None of these three factors was excessive and not infrequently had been equalled. Within the twelve previous years the tide on four different occasions had risen three feet or more above its predicted height, and one tide had exceeded its prediction by four and one tenth feet, surpassing in this respect the tide in question by almost two inches. An increment of this magnitude on the normal or predicted height of tides appreciably lower than that of the one here in question would have brought the water to its level.

A severe storm, known as the Portland storm because a steamer of that name then was lost, occurred in 1898. Its accompanying tide arose to a height of fourteen and ninety-four one hundredths feet, and water then entered two of the three sheds of the defendant which were wet by the 1909 tide. The floors of those sheds were raised thereafter, but subsequently settled so that, although some parts were higher, there were places in each of the sheds as low as fourteen and ten one hundredths feet, fourteen and twenty-

four one hundredths feet and fourteen and forty one hundredths feet above Boston base, on December 26, 1909. These levels were lower than the recorded heights of several other tides.

The records of tide heights about Boston Harbor, including those above mentioned, were available at the city engineer's office and had been published in his reports for a number of years, and reference had been made to them in other public records. There were several civil engineers in Boston who had made special study of the subject of tides and were prepared to and did advise numerous persons as to the elevation of structures in order to be secure from damage by tides.

Considerable testimony was introduced from experts on tides to the effect that the minimum height for storage of wool in the light of experience and knowledge available before the date in question, was fifteen and six tenths feet above Boston base. The practice of others engaged in the same business as to the elevation of storerooms was evidence competent to be considered as bearing upon the negligence of the defendant. *Cass v. Boston & Lowell Railroad*, 14 Allen, 448. *Pitcher v. Old Colony Street Railway*, 196 Mass. 69. *McCrea v. Beverly Gas & Electric Co.* 216 Mass. 495, 498. *Canadian Northern Railway v. Senske*, 120 C. C. A. 65, 72. Some evidence of this sort showed elevations higher than that maintained by the defendant in its sheds where the plaintiffs' wool was stored.

It is apparent from what has been said that the plaintiffs' cases did not rest upon the bald fact that the tide which caused the damage was the highest for nearly sixty years. There were many other circumstances bearing upon the issue. The subject of high tides was one to which the attention both of experts and of the public had been directed to a greater or less extent. The partial flooding of the defendant's own premises in 1898 had called its notice pointedly to the dangers incident to high tides. Reasonable caution might have been found to require not only bare avoidance of known precedents, but a slight factor of safety in the presence of such powerful forces as tides. The defendant was conducting its business not in a new and untried country, where there must be something of the unknown even in the recent past, but in one of the oldest and most highly commercialized cities of the continent, where records appear to have been kept

for a long period with considerable accuracy and studied with care, so that the teachings of experience might have been found to have been available to the ordinarily prudent business man even though himself lacking in exact knowledge. The state of society, the customs of others and the limits of reasonable expense sometimes may be decisive elements in exonerating a defendant from liability for damages resulting from unusual though not unprecedented storm or freshet, cold or flood. On these grounds perhaps *Cowles v. Pointer*, 26 Miss. 253, and *Pearce v. The Thomas Newton*, 41 Fed. Rep. 106, may be distinguished. The defendant's business was not of a nature to render impracticable the avoidance of damages from the tides. All that appears to have been required was the elevation of the floor level of its sheds or some degree of waterproofing. The improbability of the occurrence of the event is not the sole consideration, but the feasibility of preventing injurious results flowing from it often is a potent factor in determining whether there is liability. *Cormack v. New York, New Haven, & Hartford Railroad*, 196 N. Y. 442, *Jones v. Minneapolis & St. Louis Railroad*, 91 Minn. 229, and like cases, are instances where human diligence and sagacity were powerless in reason to avert the consequences of the operation of snow or storm or cold. But they are distinguishable from the cases at bar.

There was much evidence coming both from the testimony of witnesses and from the fair inferences from other facts which tended to exonerate the defendant from negligence. But we are of opinion on the whole that its weight was for the jury and that it could not have been ruled as matter of law that there was nothing upon which to rest a finding of negligence on the part of the defendant. The cases are very close on their facts. Verdicts in favor of the defendant certainly would have been warranted. But the jury hardly could have been directed that there was no evidence of negligence worthy of consideration. This conclusion is supported by *Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katharine Docks Co.* 9 Ch. D. 503, *Carney v. Caraquet Railway*, 29 New Brun. 425, and *Burt v. Victoria Graving Dock Co. Ltd.* 47 L. T. (N. S.) 378. *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553. See also *Gleeson v. Virginia Midland Railroad*, 140 U. S. 435; *Howe v. Ashland Lumber Co.* 110 Maine, 14;

Kansas City v. King, 65 Kans. 64; *Ohio & Mississippi Railway v. Ramey*, 139 Ill. 9; *Chicago, Peoria & St. Louis Railway v. Reuter*, 223 Ill. 387; *State v. Ousatonie Water Co.* 51 Conn. 137; *Willson v. Boise City*, 20 Idaho, 133; *New Brunswick Steamboat Co. v. Tiers*, 4 Zab. 697, 714; *Gulf, Colorado & Santa Fe Railway v. Pomeroy*, 67 Texas, 498, 501; *Atkinson v. Chesapeake & Ohio Railway*, 74 W. Va. 633; *Kuhnis v. Lewis River Boom & Logging Co.* 51 Wash. 196.

Reliance is placed by the defendant on *The C. H. Northam*, 181 Fed. Rep. 986. That, however, was a finding as matter of fact by a district judge upon the evidence before him, and does not rest upon any principle of law at variance with the conclusion here reached.

The defendant presented several requests for instructions in different forms, to the effect that if the plaintiffs knew where their wool was being stored and continued for a series of years without objection to deposit with the defendant, they consented to the particular place of storage and assumed the risks arising therefrom. These requests rightly were refused. The acceptance of the wool on storage for hire involved the obligation on the part of the defendant to use due care for its safety and protection. That was implied from the relation it assumed as warehouseman. Mere knowledge and acquiescence by the owner as to the place of storage are not enough to modify that contractual obligation. Essential elements as to the care required by the contract of storage in the cases at bar lie outside the mere place of storage. Nothing as to waiver of that obligation respecting protection of the goods from the danger of injury from tides was tacitly inferable from such knowledge and acquiescence as was attributable on the evidence to the plaintiffs. *Conway Bank v. American Express Co.* 8 Allen, 512. *Mooers v. Larry*, 15 Gray, 451. *Brabant & Co. v. King*, [1895] A. C. 632, 641. *Searle v. Laverick*, L. R. 9 Q. B. 122. The decisions relied on by the defendant upon this point are distinguishable. *Knowles v. Atlantic & St. Lawrence Railroad*, 38 Maine, 55, arose out of gratuitous bailment. *Brown v. Hitchcock*, 28 Vt. 452, 458, and *Parker v. Union Ice & Salt Co.* 59 Kans. 626, rest upon peculiar facts which showed such intimate familiarity with all the attendant conditions or personal directions touching the storage as to amount to a waiver of the

usual terms of the contract of bailment. No such circumstances are to be found in the cases at bar.

The plaintiffs Hecht and others and Brown and others sold certain bags of wool, stored with the defendant, before December 26, 1909, and received full payment therefor. The ruling of the Superior Court that these plaintiffs could not recover damages for injury to the wool thus sold was right. The liability of the defendant is to be determined according to the principles of the common law, for the bill of exceptions contains no reference to the warehouse receipts act, nor to the kind of receipts, if any, issued by the defendant. It simply is stated that the defendant was a public warehouseman. It may be assumed under all the circumstances that it assented to the sale, if that affects favorably its liability. The title to this wool had passed from the plaintiffs to their customers. Each bag was identified by definite marks. The wool, therefore, was "specific goods, in a deliverable state," and under the sales act (St. 1908, c. 237, § 19, rule 1) the title vested in the purchaser upon the making of the contract of sale. It further is provided by § 22 of the sales act that such goods are at the buyer's risk whether delivery has been made or not. Thus the difficulties as to change of possession and assent suggested in *Hallgarten v. Oldham*, 135 Mass. 1, 9, and *Selliger v. Kentucky*, 213 U. S. 200, 205, are eliminated. The plaintiffs do not contend that they had suffered loss on account of these bags, but they ask to recover damages and to hold the proceeds as trustees for the true owners. See *Boyden v. Hill*, 198 Mass. 477, 487. The owner of goods, or one having some general or special interest in them, commonly is the one to bring action for damage to them. See *Commercial National Bank v. Bemis*, 177 Mass. 95. Plainly the plaintiffs are not the owners and they do not contend that they are. They seek to maintain these actions only on the authority of *Blanchard v. Page*, 8 Gray, 281, and *Finn v. Western Railroad*, 112 Mass. 524. These have been recognized generally as leading decisions and would be followed implicitly in similar cases. But the principles there declared are not applicable to the facts in the cases at bar. In the former of these two cases, the shipper, the agent for an undisclosed principal who was not the consignee, was permitted to recover of a ship owner for breach of the contract of carriage. In the latter

case the consignor, who delivered goods to a common carrier, was permitted to recover damages for breach of the contract of carriage in the absence of evidence to the effect that the consignee was the owner and did not acquiesce in recovery of the full value of the goods by the consignor. But the relation between a depositor of goods and a warehouseman, the owner and agistor, and generally of a bailor and bailee, is not the same as that of shipper and common carrier. The obligation of the carrier is to perform its contract for transportation, generally set forth in a bill of lading, to which the consignor is a principal party. The duty of the bailee is commonly to deliver to the owner when he is known, in instances where there has been transfer of title during bailment, and not to the depositor. The obligations respectively resting upon the parties (apart from statute) are not in kind like those arising out of the issuance of a bill of lading by a common carrier. *Krulder v. Ellison*, 47 N. Y. 36. *Merchants' Despatch Co. v. Smith*, 76 Ill. 542. *Dawes v. Peck*, 8 T. R. 330. The relation between a bailor, who has sold the goods bailed, and the purchaser, is not naturally one of trust and confidence. They are at arms length as to each other. Therefore the bailor shows no right to recover the value of the goods bailed if he has parted with all title.

Let the entry in each case be

Defendant's exceptions overruled.

Plaintiffs' exceptions overruled.

OLD COLONY TRUST COMPANY vs. COMMONWEALTH.

LAWRENCE TRUST COMPANY vs. SAME.

DORCHESTER TRUST COMPANY vs. SAME.

Suffolk. January 15, 1915. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Statute, Construction. Trust Company, Savings department. Tax, Excise on savings departments of trust companies.

Where by a statute a provision of a former statute is made applicable to a new subject of legislation not contemplated when the earlier statute was passed,

such an interpretation of the application must be adopted as will work out practical results.

Under St. 1911, c. 337, which provides that the excise imposed on the savings departments of trust companies shall be imposed only on such of the deposits in such savings departments as do not exceed in amount the limits imposed upon deposits in savings banks, and St. 1909, c. 490, Part III, §§ 21-23, relating to the taxation of savings banks, the deductions from the deposits in the savings departments of trust companies which are allowed on account of investments in "tax exempt" securities are to be computed *pro rata* between the amount of the deposits of the trust companies which are subject to the excise and the amount of their deposits which are not subject to it.

For the purpose of making the *pro rata* computation mentioned above, the tax commissioner may obtain the necessary facts by inquiries addressed to the responsible officers of the trust companies, and there is nothing that requires him to base his computation merely on information contained in the sworn returns of the companies made by the proper officers.

THREE PETITIONS, filed in the Supreme Judicial Court on November 14, 16, and 18, 1914, each by a trust company maintaining a savings department, against the Commonwealth for the abatement of a tax or excise alleged to have been assessed unlawfully by the tax commissioner under St. 1909, c. 342, as amended by St. 1911, c. 337.

Each of the cases was heard by *Loring, J.*, who reserved it upon the pleadings and an agreed statement of facts for determination by the full court.

St. 1911, c. 337, is entitled "An act relative to the taxation of deposits in the savings departments of trust companies." Section 1 is as follows: "The tax imposed by section one of chapter three hundred and forty-two of the acts of the year nineteen hundred and nine shall apply only to such of the deposits therein designated as do not exceed in amount the limits imposed upon deposits in savings banks by section forty-six of chapter five hundred and ninety of the acts of the year nineteen hundred and eight and acts in amendment thereof and in addition thereto."

G. A. Ham, (*W. H. Taylor* with him,) for the petitioners.

A. E. Seagrave, Assistant Attorney General, for the Commonwealth.

Rugg, C. J. These petitions relate to the method of assessing upon the savings departments of trust companies the excise tax required by law. The conduct of savings departments by trust companies is regulated by St. 1908, c. 520. All deposits made in such departments with the accounts relating thereto must be

kept distinct from the general business of the corporation, except that the net profits accruing may be transferred to the general funds. All such deposits must be maintained separate from other deposits and invested in accordance with laws governing the investment of deposits in savings banks. Provision first was made for a special excise tax upon this department of trust companies by St. 1909, c. 342. It was in general to be at the same rate as that exacted from savings banks. As no limit is placed upon the amount of deposit which may be received by a trust company from any single depositor, seemingly this gave an advantage to trust companies over savings banks, which are limited in this regard to a maximum of \$1,000 from one depositor. It also enabled individual depositors of large amounts to evade taxation. It was enacted by St. 1911, c. 337, that the excise tax should be imposed only on such of these deposits as do not exceed in amounts limits permitted for deposits in savings banks. The law as to the excise tax, which is the growth of many years, thus is made applicable only to that part of the deposits in the savings departments of trust companies which corresponds with savings bank deposits in amounts from individual depositors. The savings bank law requires among other matters that investments in certain securities, which for convenience may be termed tax exempt although this is not an accurate description of them, shall be deducted from deposits before computing the excise tax. St. 1909, c. 490, Part III, §§ 21 to 23. The precise question is how these exemptions are to be applied to the savings department branch of the business of trust companies. It is the contention of the petitioners that all tax exempt investments made in connection with their savings departments shall be deducted from the portion of the savings department deposits subject to the excise tax, while the Commonwealth contends that only such proportion of these tax exempt investments is to be deducted as the deposits in the savings department which are subject to the excise tax bear to the total deposits in the savings department.

It is obvious that difficulty arises in applying the same law to dissimilar objects of taxation. No trouble is met in applying the law to savings banks. It was designed for them. But the savings departments of trust companies are unlike savings banks in material respects. The entire body of deposits in the savings bank

is subject to the excise, while only a part of the deposits in the trust company savings department is so subject. No provision is made for a separation in investment of that part of the trust company savings department deposits which is subject to the excise tax from that part which is not so subject. Indeed, such separation is prohibited by implication by that clause of St. 1908, c. 520, § 3, which requires all "deposits and the investments or loans thereof" to be appropriated solely to the security and payment of all such deposits. There could not well be an actual binding division in the face of this provision. There could be in truth no such division as is contended for by the petitioners as applied to the Old Colony Trust Company, for its tax exempt investments exceed in amount its deposits belonging to the savings bank class. No savings department in fact could exist separately where all its deposits were permanently invested in tax exempt securities without any cash on hand with which to meet demands for withdrawals. Presumably the proportion of the deposits of the savings departments of trust companies, which is invested in tax exempt securities, in the exercise of sound financial judgment is based on the total of all such deposits rather than on that part of the deposits which is subject to the excise tax. That is what would naturally be expected, and the records in the present petitions tend to confirm that inference. An interpretation of an old law, when it is applied to a new object of taxation for which it was not exactly designed, must be made so as to work out practical results in a reasonable manner. Plainly it was the purpose of the Legislature in enacting St. 1911, c. 337, to put the savings departments of trust companies on an equality with savings banks so far as possible in the matter of excise tax. That act is not susceptible of the interpretation that it was deliberately intended to give the trust companies the advantage of deducting from their taxable deposits an amount of tax exempt investments disproportionately large as compared with those deposits, investments which were purchased in part at least because of the other deposits not permissible to savings banks.

The rational interpretation of the savings bank tax law as applied to the deposits in the savings departments of trust companies is to prorate the deductions allowed between the portion of their deposits which is subject to the excise and that portion

not subject to it. That is the method by which the trust companies will in this regard be put on an equality with savings banks.

It follows from what has been said that St. 1908, c. 520, neither recognizes nor authorizes, but in substance inhibits, the segregation by savings departments of trust companies of deposits in excess of \$1,000 each from those of that sum and under, and hence that such segregation of investments cannot be made. The Dorchester Trust Company, which as a matter of book-keeping has made such division, stands on the same footing as the others in this regard.

No mention was made in the return of the Old Colony Trust Company and of the Dorchester Trust Company of the total deposits in their several savings departments, but the return gave only the total of those deposits each of \$1,000 and less and omitted any reference to the total of those over \$1,000 each. These returns were made under oath by the proper officers. Thereafter the tax commissioner on inquiry received a letter from each company, not under oath, stating the amount of the deposits of over \$1,000 in the savings department, and used this information in dividing proportionally the tax exempt investments between the amounts of all deposits over \$1,000 and all other deposits. It is contended by the petitioners that the only source of information which the tax commissioner lawfully may use in assessing this excise tax is the sworn return. They rely upon cases like *Hall v. County Commissioners*, 10 Allen, 100, *Chase v. Boston*, 193 Mass. 522, and *National Fireproofing Co. v. Revere*, 217 Mass. 63, in support of this contention. Those cases arose under statutes similar in terms to St. 1909, c. 490, Part I, § 46, which expressly provides that the return for local taxation shall be accepted as true under certain conditions. No similar provision is to be found in the sections of the excise tax return law here material. There is nothing to prevent the tax commissioner from ascertaining the truth by inquiry from the responsible officers of the trust companies. Moreover, the information thus acquired by him in the cases at bar was not in contradiction but in explanation of the return already filed. No contention is made that the facts were not ascertained and used in making the assessment, nor that the result was not true, if the basis of assessment was sound. There was no invalidity in the manner of assessing the excise.

The result is that each petition must be dismissed with costs, and it is

So ordered.

JOHN STANGY vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 18, 1915. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Negligence, Street railway, Res ipsa loquitur. Carrier, Of passengers. Evidence, Presumptions and burden of proof. Practice, Civil, Exceptions.

Where a passenger in a street railway car was injured by glass that fell from one of the car windows that was broken with a "crash" when a coal wagon came in collision with the side of the car and there is nothing to show who, if anybody, was negligent or at fault, the injured passenger has no remedy against the railway company operating the car.

Where it appears that a passenger in a street railway car was injured by reason of a collision of a coal wagon with the side of the car, there can be no resort to the doctrine of *res ipsa loquitur*, under which the happening of an unexplained accident on a street railway car may raise a presumption of fact of negligence on the part of the corporation operating the car.

Testimony stricken out by order of the presiding judge at a trial cannot be considered by this court in behalf of the plaintiff upon an exception of the plaintiff to the ordering of a verdict for the defendant, if the plaintiff did not except to the order striking out the testimony, even if the testimony stricken out may have been competent.

TORT for personal injuries sustained by the plaintiff on February 13, 1911, when he was a passenger in a street railway car operated by the defendant on Boylston Street in Boston. Writ in the Municipal Court of the City of Boston dated March 22, 1911.

On appeal to the Superior Court the case was tried before *Lawton, J.* The plaintiff's evidence is described in the opinion. The witness Carmichael was a police officer. The part of his testimony referred to in the opinion as ordered stricken out by the judge was as follows: He was asked the question, "Now where was the end of the team with reference to this broken window or those broken windows?" He answered, "The car had passed the team a little ways, and, I remember, it was along side of the car when the front struck it slued it around." The judge then said, "You

didn't see that, did you?" and the witness said, "No." The judge then ordered the answer stricken out. The witness then added, "That was from appearance." He was asked by the plaintiff's counsel, "Was that all you saw?" and answered, "Why, I just saw the position of the team." No exception was taken to the striking out of the answer of the witness quoted above.

At the close of the plaintiff's evidence the judge ruled that the plaintiff was not entitled to recover and ordered a verdict for the defendant. The plaintiff alleged exceptions.

A. R. Kelley, for the plaintiff.

S. E. Wardwell, for the defendant.

RUGG, C. J. The plaintiff, while a passenger in a trolley car running on the surface of Boylston Street in Boston, was injured by glass from the car windows broken by a "crash." The material evidence as to the way in which the windows were broken was offered by the plaintiff, and tended to show that the car was a large one and that the third or fourth window from the front of the car and one or two windows behind that were broken. Immediately thereafter a coal team belonging to one Batchelder was seen standing on the street, the horses facing "in toward the curbstone and the rear half of the wagon about five or six inches away from the car," or, as another witness testified, the team was alongside the trolley car and "parallel with the exception of slewing around when it collided," and that "the rear of the wagon was closer in to the side of the car than the horses' heads were." It also was testified that "there was a fence sticking way out from the sidewalk about up and below there," and that there was plenty of room for a team to pass between this structure and the rail.

This evidence fails to show negligence on the part of the defendant. The injury to the plaintiff resulted from a collision between the car in which he was travelling and a coal wagon. But there is nothing to indicate by whose fault this was caused. The car of the defendant was upon a public street and not in a location devoted exclusively to its uses. The mere fact of a collision between travellers on a public way without more is not enough to fasten negligence upon either, especially where as here the side and not the forward end of the car is concerned. Whether the defendant or the persons in charge of the coal team were negligent

is left wholly to conjecture. *Niland v. Boston Elevated Railway*, 213 Mass. 522. *Deagle v. New York, New Haven, & Hartford Railroad*, 217 Mass. 23. The case at bar is not within the doctrine of *res ipsa loquitur*, which oftentimes is enough to support a finding of negligence on the part of a common carrier. *Rust v. Springfield Street Railway*, 217 Mass. 116. *Bell v. New York, New Haven, & Hartford Railroad*, 217 Mass. 408. That doctrine does not establish liability where a definite cause is clear on the evidence. It applies only when the cause, although unexplained, does not happen according to common experience without fault on the part of the defendant.

The case at bar is not an instance of an unsuccessful attempt to prove the precise cause, which would not bar the plaintiff from relying upon appropriate presumptions, but it is a case where inferences are excluded because the cause is disclosed to be a definite fact. *Cassady v. Old Colony Street Railway*, 184 Mass. 156, 163. *Galligan v. Old Colony Street Railway*, 182 Mass. 211. *Winship v. New York, New Haven, & Hartford Railroad*, 170 Mass. 464. *Cook v. Newhall*, 213 Mass. 392, 395. *Buckland v. New York, New Haven, & Hartford Railroad*, 181 Mass. 3. In cases of this sort such fact must be shown to be the result of the defendant's negligence before there can be recovery.

The testimony of the witness Carmichael was stricken out by order of the presiding judge and cannot be considered. It is not necessary to determine whether it was competent, for no exception was taken to that order.

Exceptions overruled.

PATRICK J. WOODS vs. CITY OF WOBURN.

SAME vs. SAME.

Middlesex. January 21, 1915. — February 27, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Opinion of the Justices. Constitutional Law. Labor. Contract, Validity.

An opinion of the justices of this court given under c. 3, art. 2 of the Constitution upon the constitutionality of a proposed statute, being purely advisory, is not binding as a precedent, and, when the constitutionality of a similar statute

after its enactment is contested before this court in a controversy between the parties to an action, the question is to be treated as an open one.

The Legislature acting as the representative of the Commonwealth and its governmental subdivisions may determine as an employer the number of hours that shall constitute a day's labor for all those with whom the Commonwealth or any such subdivision makes contracts of employment.

The provision of St. 1899, c. 344, that eight hours shall constitute a day's work for all laborers, workmen and mechanics employed by or on behalf of any city or town in this Commonwealth that accepts the act, does not make invalid a contract of a fireman of a pumping station of the water department of a city that had accepted the act with the water commissioner of the city to work ten hours each day of the week for \$16 a week.

A contract in writing, made by a fireman of a pumping station of the water department of a city that had accepted St. 1899, c. 344, with the water commissioner of the city to work ten hours each day of the week for \$16 a week, is a valid and binding one, which is a defence to an action by such fireman against the city to recover on a *quantum meruit* compensation for services as fireman in excess of eight hours a day which he was required to perform by the terms of his contract.

It seems, that under the Fourteenth Amendment of the Constitution of the United States the constitutionality of a statute which should undertake to annul a contract of a workman or mechanic to work more than a certain number of hours in a day would be open to grave doubt.

RUGG, C. J. These are two actions brought to recover on a *quantum meruit* additional compensation for services rendered by the plaintiff as fireman in the water department of the defendant.* The plaintiff entered the employ of the defendant in 1893 and continued, ten hours constituting his working day, until December 12, 1899, when St. 1899, c. 344 was accepted by the voters of the defendant. Section 1 of this act provided that, in all cities which accepted its provisions, "Eight hours shall constitute a day's work for all laborers, workmen and mechanics now employed, or who may hereafter be employed, by or on behalf of any city or town in this Commonwealth." At this time he was receiving \$2.25 per day of ten hours, making \$13.50, or \$15.75 per week if he worked on Sunday, as he sometimes did. Apparently the length of the working day was fixed by some contract or arrangement which rendered inapplicable the nine hour day established by St. 1890, c. 375, St. 1891, c. 350, and St. 1894, c. 508, § 7. About December, 1900, an oral agreement was made

* The defendant relied in defence on the special contract of January 1, 1904, which is printed at the foot of page 418. The two cases were tried together before *Sanderson, J.*, without a jury. He found for the plaintiff in both cases, and reported the cases for determination by this court.

between the plaintiff and the water commissioner of the defendant, whereby the former was to receive \$16 per week whether he worked on Sundays or not, and was to work ten hours per day. This agreement continued until January 1, 1904, when the plaintiff signed the written agreement printed in the footnote.* The plaintiff under this agreement received a slightly higher wage than he had been getting before.

The constitutionality of the statute is involved so far as it limits the hours of labor of those employed by cities and towns, and must be decided. The justices of this court advised the Honorable Senate that the present more stringent St. 1911, c. 494, would be constitutional if enacted. *Opinion of the Justices*, 208 Mass. 619. That opinion, being purely advisory, is not binding as an authority. We, therefore, have examined the statutes here involved again, with care, touching their constitutionality. For the reasons there stated at length, which it is not necessary to repeat, we think that the Legislature, acting as the representative of the Commonwealth and its governmental subdivisions, may determine as employer the number of hours which shall constitute a day's labor for all those with whom it makes contracts of employment. This conclusion is supported by *Atkin v. Kansas*, 191 U. S. 207, *Ellis v. United States*, 206 U. S. 246, *United States v. Garbish*, 222 U. S. 257. There have

* "Board of Public Works of the City of Woburn.

Woburn, Mass.

Whereas I, Patrick J. Woods of Woburn, Massachusetts employed as a fireman in the water department of said city at the pumping station; and whereas ten hours labor per day is necessarily required in such employment, and whereas I am desirous to continue in the employ of the said city in such capacity, now therefore, in consideration of the payment to me by the said city of sixteen dollars per week for such labor, ten hours each day of the week, I hereby agree as a condition of my employment to serve the said city of Woburn as a fireman in the water department thereof ten hours daily beginning on the first day of January A.D. 1904 and continuing until I quit such service or until notice in writing by me is given to the commissioner of water and water supply of said city of my intention no longer to be bound by this agreement.

Witness my hand and seal this first day of January A.D. 1904

Patrick J. Woods. (seal)

Witness

Redmond E. Walsh."

been numerous decisions to the effect that such laws are unconstitutional.* But we are not inclined to follow them so far as they are inconsistent with the conclusion we have reached.

The next question is whether the express contract whereby the plaintiff agreed to work by the week more than eight hours each day for a stipulated weekly wage was valid in view of the statute. The vital words in St. 1899, c. 344, § 1, are exactly the same as those in U. S. Rev. St. § 3738, enacted first in 1868. It fairly may be inferred that our statute was passed in view of the federal act and that our Legislature was content with the expounded meaning of the words which thus were adopted. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 193. *McNicol's Case*, 215 Mass. 497. The meaning and effect of the federal act had been declared in *United States v. Martin*, 94 U. S. 400, to be in the nature of a direction from a principal to his agent that eight hours should be deemed to be a proper length of time for a day's labor, to control in instances when there was no special agreement upon the subject, but that "the statute does not provide that the employer and the laborer may not agree with each other as to what time shall constitute a day's work," nor contain any implication as to wages to be paid.

It has been decided by other courts that such a statute was not intended to apply where the employment was not by the day, but by the hour, week, month or year. *Luske v. Hotchkiss*, 37 Conn. 219. *Schurr v. Savigny*, 85 Mich. 144.

There is nothing in the context or circumstances attending the passage of St. 1899, c. 344, which indicates a purpose to attach a different meaning to its words than those which previous to its enactment had been attributed to the same words used in the federal act. The statute is a direction to such subordinate divisions of government as accept its provisions that, when no different agreement is made, the working day for laborers, workmen and mechanics shall be eight hours. But there is no manifestation of a purpose to prohibit the making of such agreements. It is to be noted that, at the time this statute was enacted and accepted

* *Ex parte Kuback*, 85 Cal. 274. *Cleveland v. Clements Bros. Construction Co.* 67 Ohio St. 197. *Fiske v. People*, 188 Ill. 206, 210. *Seattle v. Smyth*, 22 Wash. 327. See *People v. Coler*, 166 N. Y. 1; *People v. Grout*, 179 N. Y. 417.

by the voters of the defendant, nine hours was the length of the working day for like employees of the Commonwealth and of municipalities other than those which accepted the act, and that this continued to be so until St. 1906, c. 517. It is hardly conceivable that the Legislature could have intended to prohibit any city or town from making contracts in particular cases for a working day, at least as long as that required of its own employees of the same grade.

The conclusion follows that the oral and written contracts of the plaintiff to work for ten hours each day for a stipulated weekly wage were not contrary to law and were binding upon him. There is nothing inconsistent with this in *Atkin v. Kansas*, 191 U. S. 207, which arose under a statute quite different in terms.

It may be noted in this connection that this has been the uniform interpretation placed upon the meaning of acts like this by the executive department of the federal and of the State government. 17 Opinions of Attorneys General of U. S. 341. 19 Opinions of Attorneys General of U. S. 685. 1 Opinions of Attorneys General of Mass. 10. 3 Opinions of Attorneys General of Mass. 61.

Even if this point were less clear than it is, it would not be in accordance with sound principles to permit the plaintiff to accept in silence a stipulated weekly wage week after week and then, without previous notice, seek to recover more. It frequently has been held that compensation for work performed outside the time fixed by the statute cannot be recovered when, without protest or demand at the time the work is being performed, regular wages have been accepted without comment. *United States v. Garlinger*, 169 U. S. 316, 322. *Schurr v. Savigny*, 85 Mich. 144. *Luske v. Hotchkiss*, 37 Conn. 219. *Timmonds v. United States*, 28 C. C. A. 570. *Fitzgerald v. International Paper Co.* 96 Maine, 220. *McCarthy v. Mayor & Aldermen of New York*, 96 N. Y. 1. *Vogt v. Milwaukee*, 99 Wis. 258.

The contract in question was not abrogated by act of the parties until the plaintiff left the employ of the defendant in August, 1910, although it contained a provision that it might be terminated at any time by written notice given by the plaintiff to the water commissioner of the defendant.

There are several reasons which require a decision that the terms of the contract were not affected by any subsequent legis-

lation. It is a general rule of construction, that all statutes apply only to the future and do not relate to the past, unless such a purpose is indicated by express phrase or necessary implication. *Hanscom v. Malden & Melrose Gas Light Co.*, ante, 1. There is nothing in any of the statutes enacted during the life of the contract in question to disclose a different legislative purpose. St. 1906, c. 517, § 5, and St. 1909, c. 514, § 41, each contain an express provision that they shall not apply to contracts for work entered into before June 22, 1906, while R. L. c. 106, § 20, and St. 1907, c. 570, add nothing to the force of earlier acts.

There would be grave doubt as to the constitutionality under the Fourteenth Amendment to the Constitution of the United States of any statute which should undertake to annul such a contract as that here under consideration. The city of Woburn owns and manages its system of water supply as a private commercial venture. *Pearl v. Revere*, 219 Mass. 604, and cases there collected. A city or town doubtless owns property acquired for and devoted to a water supply in its strictly proprietary capacity. *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 519. *Higginson v. Treasurer & School House Commissioners of Boston*, 212 Mass. 583. *Worcester v. Worcester Consolidated Street Railway*, 196 U. S. 539. It thus probably is entitled to all the protections as to inviolability of its contracts undertaken in this connection which a private individual possesses under the Fourteenth Amendment, and can invoke its shield against legislation aimed to impair their validity. It cannot be presumed in the absence of plain language to that effect that the Legislature would raise so serious a constitutional question by the enactment of any statute. But, without determining the constitutional question, as a matter of construction it must be held that none of the statutes enacted during the life of this contract applied to or affected it.

It further is to be noted that neither St. 1906, c. 517, St. 1907, c. 570, nor St. 1909, c. 514, §§ 37 to 43, apply to a city in the situation of the defendant. All these statutes in terms affect only such cities and towns as have "accepted the provisions of section twenty of chapter one hundred and six of the Revised Laws" and do not include such as had accepted the corresponding provisions of earlier acts. The city of Woburn never accepted that section, but the earlier St. 1899, c. 344, which is not referred

to in any of the above acts. Apparently the Legislature has been aware of this omission of the usual reference to "the corresponding provisions of earlier laws" (see R. L. c. 106, § 20), for by St. 1913, c. 822, it required the resubmission of the acceptance of the laws respecting the eight hour day to the voters of all cities and towns which had not formally accepted either R. L. c. 106, § 20, or St. 1909, c. 514, § 42, as affected by St. 1911, c. 494.

It is not necessary to determine whether, because St. 1899, c. 344 was repealed by R. L. c. 227 and R. L. c. 106, § 20, which took its place, was repealed by St. 1909, c. 514, § 145, the defendant was subject after October 1, 1909, to the nine hour day fixed by St. 1909, c. 514, § 43, nor whether the reservations made by § 146 of the last named act were sufficiently broad to preserve to the defendant its early acceptance of the 1899 eight hour law. For the reasons already given, the plaintiff must fail.

Judgment for the defendant.

W. J. Patron, (J. D. Carney with him,) for the plaintiff.

J. E. McConnell, (J. F. Maloney with him,) for the defendant.

WILLIAM T. ULMAN & others *vs.* SUPREME COMMANDERY OF
THE UNITED ORDER OF THE GOLDEN CROSS OF THE WORLD.

Suffolk. November 18, 19, 1914. — March 1, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Contract, Of insurance, Validity. Fraternal Beneficiary Corporation, By-laws, Ultra vires. Corporation. Insurance, Life. Waiver.

A Massachusetts fraternal beneficiary corporation issued to a member a death benefit certificate which provided that it was issued and accepted upon condition that the member should comply in the future with the laws, rules and regulations then governing the benefit fund or that thereafter might be enacted by the corporation to govern that fund, and that the death benefit was payable only in accordance with and under the provisions of the laws governing that fund. A by-law of the corporation, not printed on the certificate, provided that no action or suit should "be brought or maintained in any cause or claim arising out of any membership, benefit certificate, or death of a member unless such action" were brought within one year from the time when such right of action accrued. The Massachusetts corporation and a similar corporation in another State made an agreement providing for a merger of the two and a

payment by the foreign corporation of all future claims against the Massachusetts corporation, and the benefit fund of the Massachusetts corporation was turned over to the foreign corporation. Thereafter the member, after having paid assessments to the foreign corporation under the agreement, died and proper proof of his death was made to the foreign corporation with a claim for the death benefit. Because of the pendency of a suit by another person which would determine certain questions as to the liability of the foreign corporation under the agreement of merger, no action was brought by the beneficiaries upon the certificate in question for more than a year. The foreign corporation did not assent to nor induce such postponement. *Held*, that the by-law fixing a limitation within which actions should be brought upon the certificate was reasonable and valid, that it was binding upon the beneficiaries under the certificate in favor of the foreign corporation, and that it had not been waived by that corporation.

An agreement by a foreign fraternal beneficiary corporation, made in carrying out the terms of an attempted merger with a similar Massachusetts corporation, to assume, without a new physical examination of the member by a physician, the liability of the Massachusetts corporation under the provision of a death benefit certificate issued to one of its members, is contrary to the provisions of a statute of the State where such foreign corporation was incorporated which makes it a misdemeanor punishable by a fine for such a corporation to admit a person to beneficial membership who has not been so examined; and such agreement is *ultra vires* and void and accordingly the beneficiaries under the certificate have no remedy against the foreign corporation.

CONTRACT by the beneficiaries named in a benefit certificate issued by the Supreme Council of the Home Circle (hereinafter called the Home Circle), a Massachusetts fraternal beneficiary corporation, to one William C. Ulman, the action being brought against the Supreme Commandery of the United Order of the Golden Cross (hereinafter called the Golden Cross), a fraternal beneficiary corporation organized under the laws of the State of Tennessee and authorized to do business in the Commonwealth of Massachusetts. Writ dated June 27, 1911.

The case was heard in the Superior Court by *Raymond, J.*, upon a case stated, which included the following facts among others:

William C. Ulman, the deceased, joined the Home Circle on August 12, 1899, and received from the Home Circle the benefit certificate of insurance which is the basis of the present action. The certificate did not set forth expressly the by-law of limitation described in the opinion.

In the years 1906 and 1907 the Home Circle and the defendant made an agreement by which the Home Circle was to be merged with the Golden Cross, and members of the Home Circle

in good standing were to be admitted into the Golden Cross without medical examination with the assessment rate in force in the Home Circle and with a limitation of liability under the death benefit certificates to \$2,000. In all other respects the contracts, agreements, and promises made by and between members of the Home Circle and the Supreme Council in force at the date when the Home Circle merged with the Golden Cross were to be of binding force and effect in the Golden Cross. On or about August 1, 1906, the subordinate councils of the Home Circle were organized as commanderies of the Golden Cross, and the benefit assessments, including those paid by William C. Ulman, were paid to the supreme treasurer of the Golden Cross. The assessments so paid were not mingled with the assessments received from Golden Cross commanderies, but were kept in a separate fund, and were used solely for the payment of death benefits accruing on certificates originally issued by the Home Circle.

On November 6, 1906, a bill in equity was brought in the Chancery Court of Knox County, Tennessee, by one Knapp and other members of the defendant against the Supreme Commandery of the Golden Cross and the Supreme Council of the Home Circle, seeking to have the attempted merger by agreement declared *ultra vires* and void, and to prevent such merger by perpetual injunction. Judgment was entered in that suit against the Home Circle *pro confesso* and on April 14, 1908, a final decree was entered sustaining the contentions of the plaintiffs, ordering an accounting, winding up the business attempted to be done by the merger, and forbidding the merger by perpetual injunction. The case was appealed to the Supreme Court of the State of Tennessee, and on November 30, 1908, that court rendered an opinion and judgment and entered a decree affirming the decree appealed from.

On December 23, 1908, the Home Circle went into a receiver's hands under an order of the Supreme Judicial Court of Massachusetts. The receiver intervened in the suit in Tennessee.

In the meantime, on March 8, 1908, William C. Ulman had died and his death was proved in proper form April 11, 1908.

The defendant asked for the following rulings:

"1. The general law of the Golden Cross that 'No action at law or in equity shall be brought or maintained in any court for

any cause or claim arising out of membership in the order, or upon any benefit certificate, unless the same is commenced within two years from the time when such right of action accrues; said right of action accrues when official notice of death is received by the Supreme Keeper of Records' is a valid law and regulation and is binding upon the plaintiffs and the insured, and is a bar to the present action; the cause of action, if there was one, having accrued April 11, 1908, and this action having been brought on June 27, 1911, judgment must be for the defendant.

"2. The law of the Home Circle that 'No action at law or in equity in any court shall be brought or maintained in any cause or claim arising out of any membership, benefit certificate or death of a member, unless such action is brought within one year from the time when such right of action accrues' is a valid regulation and is binding upon the plaintiffs and the insured, and is a bar to the present action; the cause of action, if there was one, having accrued April 11, 1908, and this action having been brought on June 27, 1911, judgment must be for the defendant.

"3. The law of the State of Tennessee, (being chapter 480 of the Acts of 1905) forbidding the admission into the defendant order of any person who has not been examined by a legally qualified practising physician, and whose examination has not been approved by the supervising medical authority of the association as provided by the law of the association is binding upon the defendant, a Tennessee corporation, and any attempted admission of William C. Ulman into the defendant order without medical examination (as was attempted) was invalid, void and of no effect, and consequently neither the said William C. Ulman nor his beneficiaries ever became entitled to any portion of the benefit fund of the defendant, and the judgment must be for the defendant."

"5. Upon the facts set out in the 'case stated,' the plaintiffs cannot recover, and judgment must be for the defendant.

"6. Upon all the evidence, the plaintiffs cannot maintain this action, and judgment must be for the defendant."

The judge refused to rule as requested and found for the plaintiffs in the sum of \$2,464.36. The defendant alleged exceptions.

W. H. Powers & W. Powers, for the defendant.

H. M. Williams, (*A. U. Hersey* with him,) for the plaintiffs.

BRALEY, J. The plaintiffs, who are the beneficiaries named in a benefit certificate issued to the intestate by the Home Circle, a fraternal beneficiary association organized under the laws of this Commonwealth, seek to recover the amount named in the certificate from the defendant, a corporation of like character chartered by the State of Tennessee. The grounds of recovery as stated in the first and second counts of the declaration are, that by the consolidation between the respective corporations the defendant assumed and agreed to pay the amount, or that having accepted and treated the intestate until his death as if he were a member of its organization it is liable to the same extent as if it had issued the certificate.

We are of opinion that the action cannot be maintained on either ground.

While the defendant admits that all assessments were paid and due notice of death given, it has pleaded and relies upon a by-law of the Home Circle in force when the intestate joined, that "No action at law or in equity in any court shall be brought or maintained in any cause or claim arising out of any membership, benefit certificate, or death of a member, unless such action is brought within one year from the time when such right of action accrued." But if at the date of the writ this period had long since expired, the plaintiffs contend that the by-law forms no part of the contract, or that if originally applicable it has been waived. The certificate, however, recites that it is issued and accepted upon condition that the member complies in the future with the laws, rules and regulations now governing the fund, or that hereafter may be enacted by the supreme council to govern the fund, and the death benefit is expressly declared to be payable only in accordance with, and under the provisions of, the laws governing the fund.

The by-law is not unreasonable. It protects the fund from which death benefits are to be paid from stale claims which otherwise might be so delayed in presentation that satisfactory evidence as to their validity might be lost, as well as enables the order to meet death claims and to levy assessments promptly.

Nor has the by-law been waived. The only excuse for the delay is explicitly stated to have been the desire on the part of the plaintiffs to ascertain the outcome of the litigation in *Timberlake*

v. *United Order of the Golden Cross*, 208 Mass. 411, before bringing suit. It does not appear that the defendant assented to the postponement or in any way induced the plaintiffs to forbear pressing their claim in the courts. The essential elements from which the intentional relinquishment by the defendant of the right to rely on the by-law could be found are lacking. *Schwarz v. Boston*, 151 Mass. 226. *Rand v. Hanson*, 154 Mass. 87. *Metropolitan Coal Co. v. Boutell Transportation & Towing Co.* 185 Mass. 391. *Paul v. Fidelity & Casualty Co.* 186 Mass. 413. *Solari v. Italian Society of Columbus*, 211 Mass. 382.

It being settled that the plaintiffs are bound by the terms of the contract which includes the by-law the second ruling requested should have been given. *Eliot National Bank v. Beal*, 141 Mass. 566, 567, 568. *Reynolds v. Royal Arcanum*, 192 Mass. 150, 155. *Attorney General v. Colonial Life Association*, 194 Mass. 527.

The attempted consolidation having been enjoined by a suit in chancery against the defendant in the courts of its domicile, it never has been perfected, and all the funds received from the Home Circle or its members have been paid into court under the decree, in the suit in equity in Tennessee, in which the receiver of the Home Circle appointed by this court has intervened, and the plaintiffs also have presented their claim. It is not necessary to determine whether the defendant under these circumstances can be compelled to pay a claim, if otherwise valid, in violation of the injunction. *Moshenz v. Independent Order of Ahawas Israel*, 215 Mass. 185. It is true the intestate never became a party to the suit in chancery, and that he executed a release to the defendant in reduction of the amount named in the certificate, and has paid all assessments as they became due on notice from the defendant's officers, without knowledge of the fact that moneys received from members of the Home Circle were kept distinct from moneys received from its own certificate holders. If nothing more appeared there is evidence that under the terms of the consolidation Ulman had been accepted as a member by the defendant on the basis of the original certificate as reduced by the release, and that by agreement of all concerned the defendant had succeeded to, and assumed the contractual obligations of the Home Circle. *Griffin v. Cunning-*

ham, 183 Mass. 505. And the general finding for the plaintiffs might be permitted to stand under the second count in accordance with *Timberlake v. United Order of the Golden Cross*, 208 Mass. 411, and St. 1913, c. 716, § 1. But while we held in *Timberlake v. United Order of the Golden Cross*, that the attempted consolidation even if void did not relieve the defendant from liability upon the agreed facts then appearing, with such inferences of fact as the trial judge could properly draw, the case now stated shows that when, if ever, the intestate became a member of the defendant order, the laws of Tennessee found in St. of 1905, c. 480, § 7, among other restrictions prohibited the defendant from admitting to beneficial membership any person who had not been examined by a legally qualified practicing physician, and by § 36, violation of this provision by the defendant or its officers is made a statutory misdemeanor punishable by fine. The intestate, who never applied for examination, must be presumed to have known of this limitation. *Hotchkin v. Third National Bank of Syracuse*, 219 Mass. 234. *Pittsburgh, Cincinnati & St. Louis Railway v. Keokuk & Hamilton Bridge Co.* 131 U. S. 371.

If the negotiations and subsequent proceedings had been merely an abuse of its general powers unknown to the intestate, its want of authority to make the contract would not be a defence. *Timberlake v. United Order of the Golden Cross*, *ubi supra*, and cases cited. But the defendant, for the reasons stated, not being estopped from reliance on the statute, the third request should have been given.

The judgment for the plaintiffs accordingly must be reversed and judgment entered for the defendant. St. 1909, c. 236.

So ordered.

SAMUEL F. TOWER vs. HARRY R. STANLEY, executor.

SAME vs. HARRY R. STANLEY.

SAME vs. HARRY R. STANLEY, executor.

Suffolk. November 17, 1914. — March 2, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Bills and Notes, Alteration, Holder in due course, Incomplete instrument. *Interest*. *Agency*. *Estoppel*. *Assignment*, Completion of signed incomplete instrument. *Insurance*, Life: assignment of policy. *Pledge*. *Equity Jurisdiction*, To relieve from results of fraud, To redeem pledge. *Fraud*.

Where the payee of a negotiable promissory note, which bears no provision as to payment of interest, fraudulently and without the knowledge or consent of the maker alters it by increasing its amount and inserting a provision for interest at the rate of six per cent and then transfers it by indorsement for value to one who takes it without knowledge or notice of the fraud, the indorsee under R. L. c. 73, § 141, may enforce payment of the principal of the note by the maker according to its original tenor; and, if it appears that the maker had agreed orally with the payee to pay interest at the rate of five per cent, the indorsee also may enforce payment of interest at that rate.

If the maker of a negotiable promissory note signs it, leaving a blank where the name of the payee should appear, and in good faith delivers it for value to one who is authorized to insert only his own name as payee, and if the person who so receives the note fraudulently alters its amount and either alters the rate of interest or inserts a rate where there was none written and delivers the note, still having a blank space where the payee's name should be written, to a third person who receives it in good faith and gives value for it and then writes in his own name as payee, the note when delivered to the third person is under R. L. c. 73, §§ 25, 31, an incomplete instrument, and the third person, not having completed it, as required by § 31, in accordance with the authority given by the maker, is not a holder of the note in due course, but is put upon inquiry as to the authority for filling in the blank spaces and is not entitled to enforce the note against the maker either in its altered state or, under § 141, according to its original tenor.

The former rule of common law that, where the maker of a negotiable promissory note when he delivered it left blank spaces therein, he was estopped to deny the authority of a *bona fide* purchaser of the note who in good faith filled in the blanks, was changed by R. L. c. 73, § 31, so that, when such *bona fide* purchaser of the note fills in the blank spaces, the maker is bound by the note only in case the spaces are filled in strictly in accordance with the authority he gave and within a reasonable time.

If the maker of a negotiable promissory note signs and delivers to the payee, as security for the payment of the note, a policy of insurance upon his life and an instrument of assignment of the policy and of power of attorney to collect its

proceeds and leaves blanks in the instrument where the names of the assignee and the attorney and the amount of the consideration should be written, giving to the pledgee authority to insert therein only his own name and the actual amount of the note, and the pledgee fraudulently alters the note by raising its amount and inserting a false rate of interest and then negotiates it to a holder in due course to whom he also delivers the insurance policy and the instrument of assignment and power of attorney, after having written therein the holder's name and one dollar as consideration, the holder in due course of the note may retain the insurance policy as security for the payment of the note by the maker according to its original tenor, the insured being estopped to deny the authority to fill in the blank space for the name of the assignee as it was filled in.

But if, after the policy and instrument of assignment and of power of attorney have been delivered to such holder in due course, the fraudulent pledgee receives another note from the insured for another loan made to him, he and the insured agreeing that the policy also shall be security for the payment of such additional loan, and the fraudulent pledgee thereupon without authority alters the second note and delivers it to the assignee of the policy, the insured is not estopped to deny the authority of the fraudulent pledgee to make an agreement that the policy should be security for the additional loan and the assignee has no right to retain the policy as security for such second note, either according to its original or according to its altered tenor.

THREE BILLS IN EQUITY, filed in the Supreme Judicial Court, the first on October 10 and the second and third on October 20, 1913.

In the first bill the plaintiff sought to compel the defendant, as executor of the will of Sumner C. Stanley, to deliver to him a policy of life insurance issued by the Connecticut Mutual Life Insurance Company and an instrument purporting to assign the plaintiff's rights therein to Sumner C. Stanley, alleging that the assignment, "although apparently bearing the plaintiff's signature, was, if signed by the plaintiff, materially altered after the plaintiff signed it, to wit, the name of the assignee and the name of the attorney were changed, and the amount stated as the consideration for the assignment was changed, and the plaintiff never made any assignment of the said policy to Sumner C. Stanley, or to any person in behalf of the said Sumner C. Stanley, or to the defendant, and the said assignment constitutes a cloud upon the plaintiff's title to said policy."

In the second suit, which was against the defendant personally, the plaintiff sought to have declared void and cancelled a note for \$1,500 payable to the defendant and purporting to be signed by the plaintiff.

In the third suit, which was against the defendant as executor

of the will of Sumner C. Stanley, the plaintiff sought similar relief as to three notes, one for \$400 and one for \$1,000, each bearing interest at six per cent, dated May 15, 1906, payable in twelve months to the order of George E. Williams and indorsed by him, and a third note for \$1,500 bearing interest at six per cent, dated June 26, 1907, and payable in twelve months to the order of the defendant as executor of the will of Sumner C. Stanley.

The suits were heard together by *Hammond, J.* He found the following facts among others:

In May, 1906, the plaintiff held the policy of life insurance on his own life, described in the first suit. He knew one George E. Williams, who was then general agent in Boston of the Connecticut Mutual Life Insurance Company, and shortly before May 15 he went to Williams's office to obtain a loan of \$400 from this company on the security of this policy. Williams informed him that this company would not lend money on its policies, but that Williams himself, as administrator or guardian, had funds of two of his nieces, and would make a loan of \$400.

A few days later, on May 15, 1906, Williams went to the English High School building, where the plaintiff was a teacher, and talked with him in the corridor there. No one else was present. The plaintiff had the insurance policy referred to, and Williams brought to the high school building a partially completed typewritten form of assignment of the policy and a carbon copy thereof, a receipt, two notes, and cash or checks amounting to \$400. The plaintiff then signed the notes and the form of assignment, and Williams signed the receipt. Williams then delivered to the plaintiff \$400 — \$200 by a check for that amount. It did not appear how the other \$200 was paid. Williams then also delivered to the plaintiff a receipt, dated May 15, 1906, and the carbon copy of the assignment, both of which were offered in evidence. When delivered to the plaintiff on May 15, 1906, the receipt and the carbon copy of the assignment were in the same form that they were at the trial, and the copy had, in addition, the name of George E. Williams written in in pencil where it appeared at the time of the trial.

"At the same time the plaintiff delivered to Williams the insurance policy above mentioned, and the assignment of this policy. The copy of the assignment which Williams gave to the plaintiff

was a carbon copy of the typewritten portions of the original, which Williams retained after it had been signed by the plaintiff. I find that at the time when the plaintiff signed this assignment, it did not bear the name of S. C. Stanley as assignee and attorney; that it was not signed in the presence of E. R. Wellington. I find either that the blanks for the consideration and for the names of the assignee and of the attorney were blank when the plaintiff affixed his signature to this assignment, or that these blanks were then filled in as they were filled in on the copy which Williams then handed to the plaintiff. I am in doubt as to which of these is true. I do not find any erasures in the assignment.

"I find that the transaction of May 15, 1906, was substantially as stated in the receipt above referred to. It was a loan of \$400 from Williams to the plaintiff at five per cent. The plaintiff believed, and was justified in believing, that he was dealing with Williams, and with Williams alone, either individually or in his representative capacity above stated, and he expected the notes to run to Williams as payee, and he did not contemplate that Williams would transfer the assignment to any other person or would insert in the assignment the name of any person other than Williams, but nothing was said between them on this subject. Upon cross-examination the plaintiff testified that the only thing in which at that time he was concerned was whether he should be held strictly to pay the note at its maturity.

"At the same time the plaintiff signed two notes, being notes dated May 15, 1906, referred to in the third suit. These notes are now one for \$400 and one for \$1,000. I find that when they were signed the total amount payable on the two notes was \$400, and that since they were signed the amounts payable have been altered. It is probable that the notes were originally for \$200 each, but I am in doubt as to this, except that I find that the total amount of the two notes was originally \$400 only.

"The rate of interest agreed upon between Williams and the plaintiff on this \$400 loan was five per cent. I think that when the notes were signed they contained no provision as to interest.

"A short time after the two notes and the assignment were signed by the plaintiff, probably upon the same day, Williams had the signature of Miss E. R. Wellington affixed as a witness to the signature of the plaintiff to the assignment, and had the

name of S. C. Stanley as assignee and as attorney inserted. If the blanks on the assignment as to the assignee and the attorney and the consideration were not filled in when the plaintiff signed the assignment, Williams inserted the word 'One' and the name now appearing on the assignment. As is found above, these spaces may have been left blank. I find that he had no authority from the plaintiff to insert the name of S. C. Stanley as assignee or attorney, and no authority to add the name of the witness.

"On the same day, or shortly after these two notes were signed, Williams changed the amounts payable so that they were one for \$400 and one for \$1,000, and added the interest clause, making the interest at six per cent.

"Sumner C. Stanley, shortly after this, took the two notes of May 15, 1906, and gave Williams a check dated May 15, 1906, for \$1,414, and then received the two notes and the insurance policy and the assignment of the insurance policy. The insurance policy and the assignment and the notes were found among the papers of S. C. Stanley by the present defendant, Harry R. Stanley, his executor. I think it probable that the check, although dated May 15, 1906, was originally for \$1,400, and as the transaction was delayed a few days, the amount was increased to \$1,414.

"In June, 1907, the plaintiff, desiring to borrow \$600 more, again applied to Williams, and signed two notes for an aggregate sum of \$600. These are the notes for \$1,500 each, one dated June 26, 1907, described in the third suit, and the other dated November 16, 1911, the note referred to, though inaccurately described, in the second suit. Both notes, when signed, were dated June 26, 1907. I am unable to find the amounts payable when signed, except that I find that the amount payable was filled in on each note, and the total of the amounts payable on both notes was \$600. The agreed rate of interest on the loan was five per cent. I am unable to find whether the interest rate was filled in at five per cent originally on each of these, but has since been altered to six per cent on one, and two per cent on the other, or whether these notes when signed had upon them no provisions as to interest. I find that each note when signed was blank as to the name of the payee, and that the plaintiff authorized Williams to insert his own name as payee, but gave him no authority to change the amounts or to insert six per cent as the interest rate. Nor did he

give Williams any authority, except such as is implied by law from the findings above made, to insert the name of any other person as payee.

"On July 5, 1907, the plaintiff received \$600 from George E. Williams. He received in all from Williams \$1,000; \$400 on May 15, 1906, and \$600 on July 5, 1907.

"Shortly after June 26, 1907, the defendant, Harry R. Stanley, gave a check for \$1,500 to George E. Williams, and received the note for \$1,500 dated June 26, 1907, signed by the plaintiff. When received by the defendant it was filled in as to the amount, \$1,500, and interest rate, six per cent, but the name of the payee was blank. The defendant filled in his own name as executor in the blank for the name of the payee. I find that the defendant, as well as his testator, acted in good faith and without notice of any infirmity as to this note or the notes of May 15, 1906.

"No written assignment of the insurance policy was made by the plaintiff other than the assignment already referred to. On June 26, 1907, when the plaintiff made application to Williams for a loan of \$600, he asked Williams if any further assignment was necessary, and Williams told him that none was necessary. The plaintiff testified that he signed the note 'expecting that the policy would be collateral for the new loan,' and that he 'intended to borrow the second \$600 upon the security of the policy,' and I find this to be true, if material.

"On December 13, 1911, the defendant gave Williams two checks, aggregating \$1,500, and received the note then dated November 16, 1911, for \$1,500. When the defendant received this the name of the payee was blank, and he inserted his own name as payee. The amount payable then appeared as \$1,500, and the interest rate as two per cent, payable monthly.

"In this transaction, also, I find that the defendant acted in good faith.

"There were no dealings between the plaintiff and the defendant, or Sumner C. Stanley, prior to these suits. The plaintiff, until shortly before these suits were begun, did not know that the defendant or Sumner C. Stanley held any of the notes in question, or the assignment or the policy. The plaintiff paid interest to Williams semiannually at five per cent on the loans of \$400 and \$600, the last payments of interest made by him being in June,

1913. Williams paid interest to Sumner C. Stanley and to the defendant on these notes, at the rate of six per cent until Williams's death in the summer of 1913."

The single justice reported the cases to this court for determination.

J. B. Studley, for the plaintiff.

J. M. Hallowell, for the defendant.

BRALEY, J. The plaintiff's promissory notes described in the second and third suits having been materially altered after delivery and before maturity, without his knowledge or consent, by one Williams, of whom he hired the money, raising the amounts, and also in two of them inserting a clause for interest and in the other two by increasing the rate of interest, the defendant at common law could not enforce either note against the maker. *Greenfield Savings Bank v. Stowell*, 123 Mass. 196, 198, and cases cited.

But under R. L. c. 73, § 141, this rule was changed and "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." The defendant, whose testator was upon the record an innocent purchaser for value, accordingly could recover on the first two notes the amounts for which they were originally given with interest thereon at five per cent, the rate agreed upon by the plaintiff and Williams. R. L. c. 73, § 69. *Thorpe v. White*, 188 Mass. 333. *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425, 434. R. L. c. 73, § 3.

But under the finding that when the two last notes were signed and delivered the name of the payee was in blank and Williams was authorized only to fill in his own name as payee, the plaintiff contends that the defendant is not a holder in due course. If they had been filled as authorized and then negotiated, the defendant would have held in due course instruments complete and regular upon their face without notice of any infirmity, as defined in R. L. c. 73, §§ 69, 73.

The notes, however, under § 25, requiring that "where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty," were incomplete instruments, not regular upon their face. *Shaw v. Smith*, 150 Mass. 166, 167. *Colson v. Arnot*, 57 N. Y. 253, 259.

It was well settled before the statute that the plaintiff having issued these notes, with the intent to become bound for the amounts stated, any bearer who came regularly by them could fill the blanks with his own name. The maker, having put his commercial paper in circulation, was estopped to set up the defect and a holder in good faith and for value is deemed to have been given implied authority to fill the blanks with appropriate terms. *Ives v. Farmers' Bank*, 2 Allen, 236, 240. *Burgess v. Blake*, 86 Am. St. Rep. 78, 107, 108, where many of the cases are collected.

By § 31 this rule was changed. While the person in possession has authority *prima facie* to complete it by filling up the blanks therein, it cannot when completed be enforced against any person who became a party thereto prior to completion, unless filled up in accordance with the authority given, and within a reasonable time. *Hartington National Bank v. Breslin*, 88 Neb. 47. The general purpose of the statute was to make the law of negotiable instruments uniform, and we are unable to perceive any sufficient reason why §§ 25, 31 and 69, should not be construed in conformity with their express meaning.

It is therefore plain that the defendant, while a holder for value, is not a holder in due course and having purchased with notice upon their face that when delivered by the maker they were in an inchoate state, he was put upon inquiry as to the authority of Williams, and the plaintiff is not bound by the notes in the defendant's possession. *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140. *Thorpe v. White*, 188 Mass. 333. *Fillebrown v. Hayward*, 190 Mass. 472. *Liberty Trust Co. v. Tilton*, 217 Mass. 462. R. L. c. 73, §§ 69, 73, 75.

By the first bill the plaintiff further asks that the policy of life insurance he assigned to Williams as collateral security for the payment of the first notes, and which they subsequently agreed should be held to secure the second notes, but fraudulently transferred by Williams to the testator when he purchased the first notes, may be delivered to him and the assignment cancelled. We assume in the defendant's favor from the findings of the single justice, that when delivered by the plaintiff the name of the assignee had not been inserted.

While upon the record Williams had no authority to insert any

name but his own, or to add the name of the witness, or write in the consideration, and the insertion of the name of the testator as assignee was in furtherance of the fraud practiced upon the plaintiff, yet the assignment had been given for the amounts he actually had borrowed. It was unnecessary that it should be attached to the policy, and if it had been completed and afterwards was altered materially it could have been avoided. *Bacon v. Hooker*, 177 Mass. 335. The plaintiff however was not obliged to deliver an incomplete instrument. It recites that "upon payment of loan with interest by me at any time, policy is to be returned to me and this assignment to be then null and void," and by leaving the name blank the testator, who acted in good faith, was misled into the belief that Williams, who had possession of the policy, also had the right to deal with the assignment by filling in the blank in connection with the first notes, the regularity of which upon their face was unquestioned. The plaintiff is precluded from now contending that the instrument is invalid. *Scollans v. Rollins & Sons*, 179 Mass. 346, 352. *Russell v. American Bell Telephone Co.* 180 Mass. 467, 470. *Westlake v. Dunn*, 184 Mass. 260, 262. *Herman v. Connecticut Mutual Life Ins. Co.* 218 Mass. 181.

The first notes being valid for their original tenor the plaintiff concedes that he must pay the amounts, and it would follow that upon payment he would be entitled to a cancellation of the assignment and a return of the policy.

The transaction of the second loan to the plaintiff was not in any way connected with the first loan. At that time, but unknown to the plaintiff, the policy which he agreed should be held as collateral security for the second loan, had been assigned to the defendant's testator. The assignment had passed from Williams's possession and it had ceased to be an instrument in blank, nor does it appear that the defendant knew of its original condition. The right of the defendant to retain the assignment as security for the second notes accordingly depends upon the scope of the agency of Williams, and the plaintiff is not estopped from showing, as the single justice found, that he had no authority to borrow of the defendant or to make the pledge. *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, 285. *Nourse v. Jennings*, 180 Mass. 592.

It is urged, citing *Joslyn v. Wyman*, 5 Allen, 62, that, having acted in good faith, it would be inequitable to allow the plaintiff to redeem without paying the amount of the original loans. It was there held that, although a mortgage could not be enforced as security for a debt not within its terms, yet as the parties had made an oral agreement that it should stand as security for a further loan, the mortgagor could not have it discharged in equity without payment of the money lent. But as the plaintiff never agreed that the policy should be transferred to the defendant as security for the payment of any sum whatever, the present case is not within that decision or the cases which have followed it. *Nourse v. Jennings*, 180 Mass. 592. *Whitney v. Metallic Window Screen Manuf. Co.* 187 Mass. 557, 560.

The jurisdiction of a court of equity to afford complete relief is unquestioned. *Busiere v. Reilly*, 180 Mass. 518. *Rice v. Winslow*, 182 Mass. 273.

And the defendant, as executor, upon payment with interest of the first notes, is to deliver not only the policy and assignment duly cancelled but, as executor and individually, the second notes to the plaintiff, who is to recover but one bill of costs. *Smith v. Everett*, 126 Mass. 304.

Ordered accordingly.

JAMES A. MUNROE vs. HARRY R. STANLEY, executor &
administrator, & others.

Suffolk. January 20, 1915. — March 2, 1915.*

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Bills and Notes, Alteration, Incomplete instrument, Holder in due course. Assignment. Fraud. Pledge. Estoppel. Equity Jurisdiction.

Whether, where the maker of two promissory notes delivers them, with a blank space in each of them where the name of the payee should be, to one who fraudulently alters one of them by raising its amount and the other by raising its

* This case, although decided on the same day as *Stone v. Sargent*, post, 445, was decided before that case and by order of the court is reported before it although that case was argued first.

amount and changing its date, and then, at periods about a year and a half apart, negotiates them for value to a purchaser who, after he receives such notes, in good faith inserts his own name as payee, such purchaser can be considered a holder in due course entitled to enforce the notes under R. L. c. 73, § 141, according to their original tenor, or whether he is affected with notice so that he cannot enforce them for any amount, was not determined in this suit, where the maker did not object to paying the notes according to their original tenor and did not appeal from a decree to that effect.

The maker of two notes when he signed them left blank the place for the payee's name and delivered them in that condition to one who was to procure for him a loan amounting to the face value of the notes, at the same time delivering as security a policy of insurance upon his life and an absolute assignment thereof in which the place for the assignee's name was left blank. The person to whom the notes thus were delivered fraudulently altered one by raising its amount and delivered it with the policy and the assignment to a creditor of a third person in part payment of the third person's debt. A year and a half later he altered the second note by changing its date and raising its amount and stating on its face that it was secured by the same policy as was the first and delivered it to the same person for cash. The person to whom the notes and the policy were delivered afterwards wrote his own name into the blank places. In a suit in equity by the maker against the holder of the notes and of the policy and assignment a decree was entered with the consent of the maker that upon payment of the notes according to their original tenor they and the policy and assignment should be delivered to him. The defendant alone appealed. *Held*, without deciding whether the defendant had any right to hold the security at all, that he was not a purchaser for value of the first note and certainly had no right to hold the policy as security for more than the value of the first note according to its original tenor.

It also was *held* that the mere fact that, when the insured executed the assignment of his policy and delivered it to the fraudulent person, he left a blank where the name of the assignee should have been written, did not estop him from showing the real authority of the fraudulent person, because the uncompleted notes and assignment were sufficient to put the defendant upon inquiry as to the authority of the person who delivered them to him, and inquiry would have disclosed the fraud.

BILL IN EQUITY, filed in the Superior Court on December 2, 1913, and afterwards amended, against Harry R. Stanley as executor of the will of Sumner C. Stanley and as administrator of the estate of Charles R. Stanley, the Connecticut Mutual Life Insurance Company and Atherton N. Hunt and Emery B. Gibbs, administrators with the will annexed of George E. Williams.

The allegations of the bill were in substance that the plaintiff on April 1, 1909, was insured with the defendant insurance company; that on that date he borrowed \$600 of George E. Williams, the general agent of the insurance company in Boston,

and gave him two notes, each for \$300, bearing interest, and delivered to him his policy of insurance as security; that on about that date Williams fraudulently altered one of the notes so that its amount was \$3,000 and delivered to the defendant Stanley as administrator of the estate of Charles R. Stanley for value the note, the policy and an assignment of the policy; that Williams fraudulently altered the other note dated April 1, 1909, so that it was dated September 20, 1910, and its amount was \$1,000 and on September 20, 1910, delivered that note for value to the defendant Stanley; that on or about July 1, 1911, Williams forged the plaintiff's name upon a note for \$1,000 and delivered it for value to Stanley, and on December 15, 1912, did the same as to another note for \$1,000.

The prayers of the bill were in substance that the notes be declared to be forgeries and cancelled, that the assignment of the insurance policy be declared void and that the defendants be enjoined from any action inconsistent with the plaintiff's rights so declared.

The case was heard by *Wait, J.*, a commissioner having been appointed under Equity Rule 35, to take the evidence.

From the testimony it appeared that on or about April 1, 1909, the plaintiff, at the suggestion of Williams, delivered to him two promissory notes signed by him, each for \$300, for Williams to use in procuring a loan of \$600 for the plaintiff with which to take up a loan previously made to the plaintiff by the Connecticut Mutual Life Insurance Company. The place for the name of the payee was blank in both notes.

At the same time the plaintiff delivered to Williams his insurance policy and an instrument of absolute assignment of the policy and of the power of attorney, in which were blanks for the names of the assignee and of the attorney, the oral agreement between the plaintiff and Williams being that the policy should be used to secure the loan of \$600 only.

Williams fraudulently altered one of the notes so that it called for the payment of \$3,000, and delivered it and the policy and the instrument of assignment and of power of attorney to William Odlin, Esquire, acting for the defendant Stanley, as part payment of a loan owing to the estate of Charles R. Stanley from another customer of Williams. Later the defendant wrote into the blank

space on the note the name, "Estate of Charles R. Stanley," as payee, and into the blank spaces in the instrument of assignment of the policy, the name, "Harry R. Stanley, Admr. of Estate of Charles R. Stanley," as assignee, and the name, "Harry R. Stanley, Admr.," as attorney in the power of attorney.

On or about September 20, 1910, Williams fraudulently altered the second \$300 note by raising it from \$300 to \$1,000, changing its date from April 1, 1909, to September 20, 1910, and writing on its face the words "Policy 239564 Conn. Mutual as security." He then on September 20, 1910, delivered this altered note to the defendant Stanley in consideration for \$1,000. The defendant Stanley afterwards wrote in as the payee of this note, "Harry R. Stanley, Executor of Estate of Sumner C. Stanley."

The other two notes described in the bill were wholly forgeries.

The trial judge filed the following memorandum of his findings:

"I find that before 1909 Munroe borrowed \$600, of the Connecticut Mutual Life Insurance Company, through Williams, and gave to Williams an assignment of his policy of insurance and the policy of insurance, to be used as security for the loan. When the loan became due he desired to pay it, but at the suggestion of Williams allowed it to stand, but gave Williams two notes each for \$300, and Williams then advanced the \$600, retaining the notes, policy and assignment, and apparently paid the Insurance Company.

"Williams raised one note to \$3,000, and one to \$1,000; and on April 1, 1909, borrowed from Stanley, \$3,000; on September 20, 1910, \$1,000; on July 1, 1911, \$1,000, and January 15, 1912, \$1,000, and delivered the policy and assignment as security.

"The notes of \$3,000, April 1, 1909, and \$1,000, September 20, 1910, bore the genuine signature of Munroe. Those of July 1, 1911, and January 15, 1912, bore forged signatures of Munroe. The note for \$3,000 has been raised from \$300. The note for \$1,000 has been raised from \$300 and the date changed.

"Munroe declares his readiness to pay \$600 and interest."

A final decree was made that the defendant Stanley upon payment to him of \$300 with interest from April 1, 1909, and of \$300 with interest from September 20, 1910, should deliver to the plaintiff the policy of insurance together with the assignment of

the policy and the two notes dated respectively April 1, 1909, and September 20, 1910, signed by said James A. Munroe and secured by the assignment.

The defendant Stanley appealed.

In this court it was agreed that the notes of July 1, 1911, and January 15, 1912, were forgeries.

J. M. Hollowell, for the defendant Stanley.

F. P. Garland, (*J. C. Thompson* with him,) for the plaintiff.

BRALEY, J. The third and fourth of the promissory notes referred to in the bill and specifically set forth in the schedule annexed to the answers of the defendant Stanley, each of which purports to be signed by the plaintiff as maker, having been forged by Williams, are mere nullities. *Wads v. Withington*, 1 Allen, 561. *Mackintosh v. Eliot National Bank*, 123 Mass. 393. *Rowe v. Putnam*, 131 Mass. 281.

The first and second notes, although they bear the plaintiff's genuine signatures, were incomplete instruments when delivered to Williams as the name of the payee was left in blank, and the blank remained unfilled when Williams fraudulently raised the principal of each note and delivered them to the defendant, who wrote in as payee of the first note the name of the estate of which he was administrator, and in the second note his own name as executor of the will of the testator. But as the plaintiff, who has not appealed from the decree, apparently concedes that the defendant can enforce the notes according to their original tenor it is unnecessary to decide on this branch of the case whether under R. L. c. 73, §§ 31, 141, he is a holder in due course. *Holbrook v. Schofield*, 211 Mass. 234, 237.

The plaintiff also as part of the transaction having delivered as collateral security for payment of the notes his policy of life insurance in the defendant company, with an assignment under seal, absolute upon its face, and the name of the assignee in blank, which Williams subsequently delivered with the first note to the defendant's agent who thereupon filled in the name of "Harry R. Stanley, Admr. of Estate of Charles R. Stanley, Boston, Mass.," the defendant contends, that he can treat the notes as evidence of the indebtedness, and retain the policy until repaid the full amount of the moneys advanced.

It is plain from his own evidence as well as from the evidence

of his agent, and the indorsement on the face of the second note, that at the time of transference the policy was understood to be held as security for the first note. It was to be surrendered and the assignment discharged upon payment. If, as the defendant urges, the notes are treated as wholly avoided, there is no precedent obligation or debt binding on the plaintiff which must be satisfied before relief can be decreed. The distinction between the enforcement of a mortgage where the debt is barred by the statute of limitations as in *Thayer v. Mann*, 19 Pick. 535, and *Jeffrey v. Rosenfeld*, 179 Mass. 506, and the present case is obvious. The statute of limitations does not extinguish the debt, it merely bars the remedy. While it could be found on the testimony of the plaintiff, that Williams had authority upon negotiation to fill in the blank necessary to complete the notes, he had none to change for his own gain what was shown by their written terms. And at common law they would be wholly void even in the hands of a purchaser for value without notice, and under the statute enforceable only for the amount for which they were originally given. *Greenfield Savings Bank v. Stowell*, 123 Mass. 196, 202, 203, and cases cited. R. L. c. 73, §§ 31, 141.

The defendant furthermore as between himself and the plaintiff is not a purchaser for value of the first note. It was not taken in payment of any antecedent debt of the plaintiff, but was applied at Williams's request in satisfaction of an outstanding loan made by the defendant to another party whom he purported to represent. *Goodwin v. Massachusetts Loan & Trust Co.* 152 Mass. 189, 199. *Clark v. Flint*, 22 Pick. 231, 243. *Railroad Co. v. National Bank of the Republic*, 102 U. S. 14. See *Peoples' Savings Bank v. Bates*, 120 U. S. 556. The obligation of the plaintiff for money lent having rested solely on the notes, the debt or obligation incurred by Williams to the defendant as distinguished from the original consideration cannot be enforced through retention of the policy. *Wheelock v. Freeman*, 13 Pick. 165. *Adams v. Frye*, 3 Met. 103. *Stoddard v. Penniman*, 108 Mass. 366. *Greenfield Savings Bank v. Stowell*, *supra*. *Mackintosh v. Eliot National Bank*, *supra*. *Burnes v. New Mineral Fertilizer Co.* 218 Mass. 300.

It is also contended that, having left the place for the name of the assignee unfilled, the plaintiff is estopped from showing the

actual transaction and the agency of Williams. *Herman v. Connecticut Mutual Life Ins. Co.* 218 Mass. 181. The defendant is not a purchaser for value of a non-negotiable contract, from one who apparently is the owner of the legal title, but of negotiable paper for which it was accepted as collateral security even if not physically attached to the notes. The record contains no representations relating to the policy or to the notes, and under the circumstances its possession by Williams did not raise a conclusive presumption that he was vested with the absolute ownership. *Commercial National Bank v. Bemis*, 177 Mass. 95, 98. The question of estoppel by conduct, or equitable estoppel, is a question of fact if more than one inference can be drawn from the testimony. *Snow v. Hutchins*, 160 Mass. 111, 116. The presiding judge, who ordered a decree for the plaintiff, was warranted on the record in finding that the defendant in discounting the notes and making the loans dealt with him as the plaintiff's agent, and not as a borrower on his own account, and that the money was lent to the plaintiff secured by a pledge of the plaintiff's policy. The evidence moreover leaves no doubt, that the transaction in question was similar in character to other transactions, in which the defendant discounted notes presented by Williams upon the understanding that he was acting for the makers. The uncompleted notes were sufficient to put the defendant upon inquiry as to Williams's authority, and upon communication with the plaintiff and maker, the fraud would have been easily discovered. *Record v. Littlefield*, 218 Mass. 483. *Tower v. Stanley*, *ante*, 429. R. L. c. 73, § 31.

It also should be noticed that the second note, which until changed bore the same date as the first note, was delivered to the defendant more than fifteen months after Williams received it from the plaintiff, and although by § 31 the holder could fill in the name of the payee, its insertion does not appear to have been within a reasonable time. We prefer, however, to rest our decision on the grounds previously stated.

Nor can the claim, that the plaintiff pledged the policy to Williams who repledged it for his own purposes to the defendant, be sustained. The plaintiff did not borrow from Williams. The money when procured was to be applied in payment of the plaintiff's overdue notes for like amounts running to the insurance

company as payee, with the policy as collateral, which remained in Williams's possession and control as its general agent.

The defendant having failed to bring himself within the principle, that a purchaser for value in good faith from one entrusted with the apparent title and absolute ownership of personal property is protected from the prior right of the true owner and pledgor, because the pledgor is estopped from showing the true state of the title, or that where one of two innocent parties must suffer from the fraud of a third party, the party whose negligence has caused the wrong must bear the loss, the decree is affirmed with costs. *Russell v. American Bell Telephone Co.* 180 Mass. 467. *Gardner v. Beacon Trust Co.* 190 Mass. 27, 28, 29.

Ordered accordingly.

ALARIC STONE vs. HELEN S. SARGENT & others.

Suffolk. January 12, 1915. — March 2, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Bills and Notes, Alteration, Holder in due course, Incomplete instrument. *Fraud*.
Agency. *Equity Jurisdiction*, To relieve from the results of fraud. *Insurance*, Life: assignment of policy. *Assignment*. *Estoppel*.

If the general agent of an insurance company which is the payee in a note of one of its policy holders, given to secure a loan by it, without the knowledge of the maker fraudulently alters the note by raising its amount and erasing the name of the payee and delivers it with the place for the name of the payee blank to one who pays value for it, such purchaser because of the incomplete state of the instrument is put upon notice of the lack of authority of the agent for his acts and has not the right of recovery upon the note according to its original tenor given to a holder in due course by R. L. c. 73, § 141; and the maker is entitled to have the note delivered to him for cancellation.

If the holder of a policy of life insurance, as security for the payment of notes made by him payable to the insurance company, delivers to a general agent for the company his policy and an assignment of his rights therein, leaving blank the place for the name of the assignee and writing at the bottom of the assignment the words, "In case of death all balance over notes to be paid to my estate," and the agent agrees with him that the notes and the policy shall remain with the company and shall not be negotiated by it; and if the agent fraudulently alters the notes by raising their amounts and, as to one, erasing the name of the payee, and delivers the note with the name of the payee blank and the assignment with the name of the assignee blank and the policy

to a person who pays value therefor, such person is put upon inquiry as to the authority of the agent, and the policy holder by a suit in equity can compel a redelivery of the note for cancellation, and a redelivery of the policy and of the assignment without being obliged first to pay any part of what was paid to the agent by the person who received them from the agent.

BILL IN EQUITY, filed in the Superior Court on November 13, 1913, and afterwards amended, against Helen S. Sargent, the Connecticut Mutual Life Insurance Company, and Emery B. Gibbs and Atherton N. Hunt, executors of the will of George E. Williams, alleging in substance that the plaintiff in April, 1909, delivered to Williams as general agent of the defendant company two notes, each for \$250, payable to the order of the defendant company in one year from their date, and, to secure their payment, an assignment of the plaintiff's life insurance policy, Williams agreeing with him that the company would retain and would not negotiate the notes or the policy; that Williams altered the notes by raising their amounts to \$1,250 each and by erasing the name of the payee and delivered one of them to the defendant Sargent, the other remaining in his hands at the time of his death. The plaintiff prayed for an injunction against any action being brought upon the notes, that the notes be declared void and delivered to him and that the policy be delivered to the plaintiff upon the payment by him of such sum as the court might determine to be due from him.

It appeared from the record that a cross bill was filed by the executors of the will of Williams.

The bill and cross bill were heard by *Pierce, J.*, a commissioner having been appointed under Equity Rule 35 to take the testimony. The judge filed a memorandum of findings of fact and rulings of law which included the following:

The plaintiff was a master in the Boston Latin School, having "the strength and the weakness of a modern up-to-date, first-class school teacher; that is to say, he looked to be honest, rugged, vigorous, without stain or defect. His testimony showed him to be free of worldly experience, gullible and ill adapted to fence with the adroit, unscrupulous, well armored and well armed agent of a large insurance company."

On March 17, 1909, he wrote the Connecticut Mutual Life Insurance Company at their office in Boston to the effect that

he desired a loan. In response thereto Williams, the general agent for the Insurance Company, called upon him at his room in the Boston Latin School building. Williams stated that he had called in response to the letter sent to the company by Stone. Stone replied that he desired to borrow \$500, to which Williams answered that the company did not like to make loans on their policies for the reason that the borrowers were slow in repayment, and asked if he would be willing to have someone else loan the money, stating that he could arrange it. Stone replied that he was not willing to obtain it elsewhere; that he did not wish to have his policy in the hands of any one other than the company; that he could get it easily from friends, but desired to get it from the company because it would be easier for his wife to take care of in the event of his death. In other words, he refused absolutely to borrow from any one other than the Connecticut Mutual Life Insurance Company.

Williams then said that if he insisted upon it the company was bound to make the loan and it was arranged that Stone should bring to the Latin School his policy.

Within a few days Williams again came to Stone's room. Stone had the policy. Williams stated that it was advisable to have two notes of \$250 rather than one of \$500, because they were easier to renew than the single note. Thereupon Stone started to fill out two blank forms of notes presented to him by Williams for that purpose. After a moment of time, during which there was conversation relating to the filling out of the notes, Williams, while sitting at Stone's desk, in his immediate presence, with the assent of Stone, took the blanks and proceeded to fill in the blank places. When completed the two notes were handed to Stone, who read them and signed them. The notes were complete in all respects.

At the same time Stone signed an assignment of his policy without reading it and with its blanks unfilled. The assignment was absolute in form save that at the very end the words "In case of death all balance over notes to be paid to my estate" appeared, thus disclosing that the assignment was given as security for the payment of notes and excluding the theory of a sale of Stone's interest.

The notes and assignment were delivered to Williams for

delivery to the company, and a check for \$475.95 was received by Stone through the mail about May 1, 1909.

Interest and premiums were paid by Stone by checks sent to the Boston office of the Connecticut Mutual Life Insurance Company as they severally became due, and receipts were duly sent therefor by Williams to Stone. Williams duly notified the company of the receipts of premiums, but never of the receipts of interest, and the company never directly or inferentially had any knowledge, or information leading by inference to knowledge, that any money had been lent to Stone by it through Williams, or otherwise, or that any interest had been paid by Stone to it through Williams, or had been received by any one on such an account.

Of the two notes entrusted to Williams in April, 1909, for delivery to the payee, the Connecticut Mutual Life Insurance Company, Williams retained one in his own possession, and sold the other almost immediately after its receipt to Harry R. Stanley, Esquire, who in turn sold it to his sister, the defendant Helen Sargent. Stanley was her agent and had charge of her property as trustee.

Both notes had been fraudulently altered by Williams in substantial and material ways. In the process of alteration he caused the date, the amount \$250 in figures, the amount in writing, the name of the payee, and the rate of interest to be erased or obliterated in some manner and by some means not fully disclosed, and in place thereof made new and different figures thereon, inserted a new and changed time of payment and of amount to be paid, \$1,250, and also, in the one he retained, a new and unauthorized name as payee, himself, and in the other he left blank the place designed for the insertion of the name of the payee.

The note above described as retained in the possession of Williams was still in his possession at the time of his death, July 28, 1913.

"It is clear that in his lifetime Williams could not have sued Stone successfully to collect the note in its original or altered form. It is equally clear that there never existed as between Williams and Stone any contract, express or implied, relying upon which Williams at law or in equity could compel Stone to pay him any

sum whatsoever. Stone told Williams in the most unmistakable way that he refused to become a borrower from any person or corporation other than the Connecticut Mutual Life Insurance Company, and with such an assertion no room is left at law or in equity for the growth of any implied obligation."

As regards the other note, when it was delivered or sold by Williams, even assuming that it was complete in other respects, it was incomplete as to the name of the payee; and the rights of Helen Sargent depend upon the real authority which Stone had in fact given in the matter. As Stone had given no authority, Sargent got none and was put upon inquiry of Stone to ascertain his rights and Stone's obligation.

No money or money's worth passed from Sargent, or those under whom she directly claimed, to Stone, and she therefore had no rights at law or in equity to call upon him for the discharge of any express or implied obligation.

In lending the money to Stone, Williams did not have any authority express or implied to act for the Connecticut Mutual Life Insurance Company. It was not a part of his duty so to do and was not an incident naturally attached to his position as general manager of an insurance office. Being outside of the ordinary duties appertaining to such a position, all persons dealing with him in relation to such a subject matter were bound at their peril to ascertain the limits of his authority.

A final decree was entered dismissing the cross bill, ordering that both of the notes be delivered to the plaintiff for cancellation and that the policy and the assignment be returned to him. The defendant Sargent appealed.

J. M. Hollowell, for the defendant Sargent.

H. T. Richardson, for the plaintiff.

BRALEY, J. The plaintiff's promissory note having been materially altered without his knowledge or assent by Williams, who among other changes erased the name of the payee leaving the space in blank, and raised the amount of the principal five fold, it is unenforceable according to its original tenor unless the defendant Sargent to whom after alteration it was transferred is a holder in due course. R. L. c. 73, § 141. But as the presiding judge has found that when delivered to her agents it was an incomplete instrument he is entitled to a return and cancellation

of the note. R. L. c. 73, § 31. *Andrews v. Sibley*, ante, 10. *Tower v. Stanley*, ante, 429.

The plaintiff when he gave the note also executed an assignment, with the blank for the name of the assignee unfilled, of his policy of life insurance as collateral security, which was delivered by Williams to the defendant with the note in question. It is contended, that the plaintiff is estopped from recovering the policy unless he first pays the entire amount for which the defendant took it as security. But the assignment was not an unqualified transfer. The words "in case of death all balance over notes to be paid to my estate" appearing on the face are sufficient with the other evidence to warrant the judge's finding, that it was pledged for the payment of the note in its original form held by the defendant, as well as for another note of the plaintiff's retained by Williams, but declared void by the decree because fraudulently altered, from which the defendants, his executors, have not appealed. The policy is not a negotiable instrument, and if the assignment is considered apart from the notes the words quoted clearly indicate that Williams was not clothed with the absolute title, and the defendant was put upon inquiry as to the source and extent of his ownership. *Tuttle v. First National Bank of Greenfield*, 187 Mass. 533. *Allen v. Puritan Trust Co.* 211 Mass. 409, 420. 2 Pom. Eq. Jur. §§ 710, 711. It never was an independent right to property capable of being transferred separately from the notes, so that one person could hold the principal obligation, and another person would hold the policy. *Whitaker v. Sumner*, 20 Pick. 399. *White v. Dodge*, 187 Mass. 449.

The note having been uncollectible for the reasons stated, the lien on the policy has been discharged. *Jarvis v. Rogers*, 15 Mass. 389. *Leighton v. Bowen*, 75 Maine, 504, 508. *Green v. Sinker, Davis & Co.* 135 Ind. 434. Nor under the doctrine of *Joslyn v. Wyman*, 5 Allen, 62, as a condition to relief should the plaintiff in equity be required to pay the amount he received. As a borrower of money he is expressly found not to have made any contract express or implied with either Williams or the defendant. *Foote v. Cotting*, 195 Mass. 55, 61.

The policy as well as the note must be returned to the plaintiff, and the decree is affirmed with costs.

Ordered accordingly.

ARTHUR P. FRENCH vs. GEORGE VON L. MEYER.

Suffolk. January 12, 13, 1915. — March 2, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Attorney at Law. Agency, Scope of authority. Contract, What constitutes, Construction, Implied.

An authorisation of an attorney by a client to pay such expenses as may be necessary in the conduct of certain litigation does not authorize the payment by the attorney of an execution for costs issued against the client at the termination of the litigation.

Where, before entering upon certain litigation in the federal courts in Oregon relating to land in that State, a client of an attorney at law agrees that he will reimburse his attorney for "whatever expense" becomes "necessary in the carrying on" of the case, "whatever" he has "to pay out in the way of cash expenses," and, upon the litigation resulting unfavorably for the client in the lower court, he authorizes an appeal and with a surety signs an appeal bond, if, upon the appeal also resulting unfavorably to the client and an execution for costs issued against him which is paid by the surety and for the repayment of which to the surety the client is liable, the attorney reimburses the surety, such payment is made by the attorney as a volunteer and he cannot recover from his client the amount so paid to the surety because he was not authorized to make the payment in behalf of the client and the client did not promise to reimburse him therefor.

CONTRACT by an attorney at law against a former client upon an account annexed consisting of three items, the first of which was for \$1.20 paid to the clerk of the United States Circuit Court of Appeals in Oregon. The second item was for "cash paid American Surety Company of New York at your request, to reimburse said company on appeal bond in Klamath Falls Land case, \$584.59." The third item was for "services on Klamath Falls Land case, \$250." Writ in the Municipal Court of the City of Boston dated December 12, 1913.

On removal of the case to the Superior Court, it was tried before *Bell, J.* It appeared that the litigation with regard to the "Klamath Falls" land consisted of two suits in the Circuit Court of the United States for the District of Oregon. The plaintiff testified that, in a conversation with him at his office in 1907, before the litigation was begun, the defendant said to him in

substance "that whatever expense became necessary in the carrying on those cases in Klamath Falls, whatever I had to pay out in the way of cash expenses that Mr. Meyer would reimburse me for."

The cases in Oregon resulted, in the first instance, in a decision of the court in Oregon against Mr. Meyer. An appeal from that decision was claimed to the United States Court of Appeals. Six months were allowed between the time of the claim of the appeal and the final perfecting of the papers, within which it was necessary to file an appeal bond. Such a bond was prepared; signed by Mr. Meyer, signed also by the American Surety Company as surety, and sent out to the court in Oregon. After a hearing in the Court of Appeals, it was decided that that bond was filed one day late, and that therefore the appeal never had been perfected properly, and a judgment for costs was entered against Mr. Meyer, which was covered by this bond. Thereupon Mr. Meyer as principal and the American Surety Company as surety, became liable for the amount of this judgment for costs, which was \$584.59. Mr. Meyer was not informed of this judgment for costs.

The defendant contended that the payment set out in the second item in the account annexed to the declaration was not a necessary expense of the litigation but was the payment of a judgment for costs upon which execution could issue against the defendant in the cases in the United States Circuit Court of Appeals and that the payment was unauthorized.

Other material facts are stated in the opinion.

At the close of the evidence the defendant asked for the following rulings among others:

"1. Upon all the evidence the plaintiff is not entitled to recover."

"7. An authorization to pay such expenses as may be necessary in the conduct of a case does not authorize the payment by an attorney of an execution for costs, and the plaintiff cannot recover.

"8. If Meyer said to French that he wanted him to pay such expenses as might be necessary in the conducting of the cases of Wright against Meyer and Hot Springs Company against Meyer, that did not authorize French to pay the costs upon an execution

for costs in that suit to the surety on the bonds or to the plaintiff in those cases, and the plaintiff in this case cannot recover except on . . . item one in the declaration."

The rulings were refused. Only the first two items of the account were submitted to the jury. The jury found for the plaintiff in the sum of \$601.90; and the defendant alleged exceptions.

E. R. Anderson, (*H. Guild* with him,) for the defendant.

F. L. Norton, for the plaintiff.

BRALEY, J. The plaintiff's general employment as an attorney at law authorized him to institute the actions brought in the defendant's behalf to obtain title to the lands, and to take all necessary steps for the protection and promotion of his client's legal rights during the litigation. *Shores v. Caswell*, 13 Met. 413. *Barrett v. Towne*, 196 Mass. 487, 490. It is unnecessary, however, to consider whether under *Grosvenor v. Danforth*, 16 Mass. 74, and *Adams v. Robinson*, 1 Pick. 461, he also possessed as between himself and the defendant implied authority to take appeals from the adverse decision of the trial court if he deemed the judgment erroneous. See *Tobler v. Nevitt*, 45 Col. 231; 16 Ann. Cas. 925, and note for a collection and review of cases. The defendant executed the appeal bonds, and the evidence of the parties would have warranted the jury in finding that the appeals were taken and prosecuted at the defendant's express request. While there was no point of time before final judgment when the plaintiff ceased to be the defendant's attorney, the scope of his agency depends upon his instructions originally given and not withdrawn when the defendant determined to appeal. Independently of such instructions the defendant while chargeable with expenses and fees for professional services required for the perfection and prosecution of the appeals, would not be responsible to the plaintiff for disbursements necessary to satisfy the judgment for costs imposed on the defendant by the appellate court because the appeals were not seasonably entered.

If we now recur to the plaintiff's evidence, the jury could find that, at an interview before suit was brought, the defendant promised to reimburse the plaintiff for all expenses necessary to carry on the cases, and whatever he had to pay by way of disbursements would be refunded. But when the defendant upon consultation with the plaintiff decided to appeal, no further in-

structions were given. The possibility that the appeals might be unsuccessful may have been within the contemplation of the parties, but the contingency that they might fail, because not perfected, was foreign to their thought.

The plaintiff apparently did not notify the defendant of the payments until two or three years had elapsed, and there is no evidence from which acquiescence or ratification, the equivalent of original authority, could be found. *Cohen v. Jackson*, 210 Mass. 328, 331.

The result is that, the payments having been voluntary, the defendant is under no legal obligation to make reimbursement, and his first, seventh and eighth requests should have been given. *Foots v. Cotting*, 195 Mass. 55, 61.

The exceptions to the admission and exclusion of evidence, and the refusal to give the remaining requests, and to the instructions, require no comment for reason sufficiently stated.

Exceptions sustained.

THOMAS UPHAM, trustee, *vs.* ROBERT E. PARKER & others.
HENRY PARKMAN, trustee, *vs.* SAME.

Suffolk. January 19, 20, 1915. — March 2, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Devise and Legacy. Words, "Legal heirs," "Convey, assign and transfer."

A testator left all his real and personal property in trust, to pay his widow one third of the net income during her life, and to pay the remaining two thirds of the net income and after the death of his widow the whole of it to his three daughters named in equal shares, "and after the death of one or more of them to pay over the proportion of said net income to which such deceased would have been entitled if living to the legal heirs of such deceased: and upon the death of my wife and of all my said daughters to convey, assign and transfer all my said real and personal property to the legal heirs of my said daughters in equal proportions by right of representation to have and to hold to them their heirs and assigns forever." The testator's widow waived the provisions of his will. The testator's three daughters died one after another, two unmarried and the other leaving a husband and children. Last of all the testator's widow died. One of the unmarried daughters of the testator was also the daughter of his widow. His other two daughters were by a former marriage. On a bill for

instructions as to the final distribution of the trust fund, it was *held*, that the "legal heirs" of the testator's daughters to whom the distribution was to be made were their respective heirs at the times of their respective deaths, that the words "convey, assign and transfer" did not show an intention of the testator to postpone the vesting of the remainders until the time of distribution but referred merely to the time when the donees would become entitled to possession; and that the fact that the testator's widow had waived the provisions for her benefit in his will did not prevent her from taking her share as the legal heir of her daughter.

CROSBY, J. These are bills in equity for instructions * as to the distribution of a trust fund under the will of William P. Emerson. The will was dated April 11, 1870, and was duly proved and allowed by the Probate Court for the County of Suffolk by a decree dated May 15, 1871. The material provision of the will is as follows:

"I appoint Thomas Upham of Boston, Massachusetts, who shall be exempt from furnishing sureties on his official bonds, Executor of this my last will and testament and also give, devise and bequeath to him all the real and personal estate of or to which I shall die seized, possessed or entitled in trust nevertheless to manage and take care of said real estate with power to lease the same and to collect the rents and profits accruing therefrom: and to take care of, manage and invest said personal estate and any personal property that may arise from any sale of real estate as hereinafter provided and collect the income thereof; and of the net income of all said real and personal property remaining after payment of all proper charges and expenses to pay over one third ($\frac{1}{3}$) to my wife Harriet M. Emerson once a quarter, her receipt to be a full discharge therefor during her natural life: and to pay the remaining two thirds ($\frac{2}{3}$) and after the death of my wife the whole of said net income, in equal shares to my daughters Helen W. Emerson, Adelaide A. Emerson and Emily

* The first bill was filed in the Probate Court for the County of Suffolk on January 15, 1913, and from the decree made by that court, three of the defendants appealed to the Supreme Judicial Court. The second bill was filed in the Supreme Judicial Court on April 25, 1914. A decree was made on the second bill which is mentioned near the end of the opinion. The same three defendants appealed from that decree. The cases came on to be heard together before *Pierce, J.*, who at the request of the parties reserved them upon the pleadings and an agreed statement of facts for determination by the full court.

U. Emerson, their receipts to be a full discharge therefor during their lives and after the death of one or more of them to pay over the proportion of said net income to which such deceased would have been entitled if living to the legal heirs of such deceased: and upon the death of my wife and of all my said daughters to convey, assign and transfer all my said real and personal property to the legal heirs of my said daughters in equal proportions by right of representation to have and to hold to them their heirs and assigns forever."

The plaintiff Thomas Upham was duly appointed and qualified as executor and trustee under the will in May, 1871. The testator's widow, Harriet M. Emerson, duly waived the provisions made for her benefit in the will, and certain real estate and the proceeds of certain other real property previously sold by the trustee was set off to her as her dower, the property so set off being held by the defendant Parkman, the plaintiff in the second case, as trustee; the widow to receive the income for her life, and the principal thereof to be "at her death disposed of under the will of said William P. Emerson."

The testator's three daughters died as follows: Adelaide in 1871, Emily in 1874, and Helen in 1876. Adelaide and Emily never were married. Helen was survived by her husband and three children. She died testate and gave all her property to her husband. Emily was the youngest and was the daughter of the surviving widow. Adelaide and Helen were children of the testator by a former marriage.

Harriet M. Emerson, the testator's widow, died on July 17, 1907, testate, although she made no disposition by her will of any interest which she might have in the trust fund in question. Her only heirs at law and next of kin are the defendants Frank M. Parker, Robert E. Parker, Gillis M. Parker, nephews, and Florence T. Olliff, a niece. The question is whether the legal heirs of the daughters are to be ascertained as of the dates of the deaths of the daughters respectively, or whether they are to be ascertained as of the time of the distribution of the fund.

As the widow and the three daughters all have deceased, the time has arrived for the distribution of the trust fund. The appellants, as next of kin of Harriet M. Emerson, contend that the

widow inherited a vested interest or share in one eighth of the fund from her daughter Emily, and that such share belongs to the estate of Harriet M. Emerson.

The contention of the husband and surviving children of the testator's daughter, Helen W. Beseler, is that these three children were at the time of distribution the only heirs of their aunts, the testator's daughters Adelaide and Emily, and that they and their father were the only heirs of their mother; that the heirs should be ascertained as of the time of distribution, and that therefore the husband and daughters of Helen are entitled to the whole of the fund.

The familiar rule of construction that when a person refers to his heirs as persons who are to take the whole or a portion of his estate it is presumed to mean his heirs to be determined as of the time of his death unless a different intention clearly appears from the will, is well established. Different reasons have been given for the adoption of this rule. Whether it was adopted on the ground that the law favors vested rather than contingent remainders, or because a testator who has made a gift to his heirs desires, or at least is willing, that the law should take its course, or for some other reason, is immaterial at this time. *Welch v. Blanchard*, 208 Mass. 523. *Jewett v. Jewett*, 200 Mass. 310. *Bosworth v. Stockbridge*, 189 Mass. 266. This rule not only applies where the remainder is to the heirs of the testator, but is equally applicable where the remainder is to the heirs of a life tenant. *Gardner v. Skinner*, 195 Mass. 164.

The rules of construction which have been adopted are to be followed so far as they aid in determining the intention of the testator. That intention is to be ascertained from the will as a whole. As was said by Sheldon, J., in *Crapo v. Price*, 190 Mass. 317, 318: "Certain general rules have been adopted for the construction of wills; and it is important that such rules, especially so far as they have become rules of property or have declared principles of substantive law, should not be lightly departed from."

This provision of the will was construed by this court, so far as it referred to the payment of the income of the trust fund, in the case of *Upham v. Emerson*, 119 Mass. 509, in which it was held that the "legal heirs" of Adelaide A. Emerson were her two

sisters, Helen W. Beseler and Emily U. Emerson, and that the "legal heirs" of Emily U. Emerson were her sister, Helen W. Beseler, and her mother, Harriet M. Emerson. Gen. Sts. c. 91, § 1. That case decided that Mrs. Emerson's waiver deprived her of any beneficial interest under and by virtue of the provisions of the will, and consequently it was held that the widow was not entitled to any portion of Emily U. Emerson's share of the income at her death. The same words "legal heirs" are used in providing for the final distribution of the principal, as are used in the provision relating to the payment of the income, which is a fact of great significance in determining whether Emily took a vested remainder in any portion of the principal.

In *Russell v. Lilly*, 213 Mass. 529, 530, this court said that "where a word is used in one sense in one part of a will, and there is nothing to indicate a different meaning when the same word is used in another part, it may be presumed that the same meaning was intended."

It is difficult to find that the testator used the words "legal heirs" in any different sense, as applied to the final distribution of the principal, from that in which he used the identical words when he provided for the disposition of the income.

The former decision held that Mrs. Emerson could not take any portion of the remainder created by the will as a legal heir of Emily, because she would be obliged to take under the will and not by descent from Emily, and she was therefore barred by her waiver; however, as to any portion of the estate in which Emily took a vested remainder by the terms of the will, it would seem that her mother would inherit as her heir at law. While this question was not in issue in the case of *Upham v. Emerson*, 119 Mass. 509, it was intimated that Mrs. Emerson might so inherit as the heir at law of her daughter when the court said (p. 511): "It is not necessary to hold that the widow, by renouncing the provisions in her favor, is to be held to have renounced the benefits which she might receive by reason of her relation to some devisee or legatee under the will; so that if there had been an absolute devise or legacy to her daughter, she would be prevented by her waiver from receiving what she would otherwise be entitled to as heir."

When the testator provided in his will that the income which

he had given to his wife for her life should after her death be paid over in equal shares to his three daughters, it is apparent that he did not contemplate that his wife would survive his daughters; nor is there anything in the will from which it could be found that he believed his daughter Emily would die leaving no issue surviving; and while he must have known that his wife might waive the provisions of the will made for her benefit, still unless he also contemplated that his wife would survive Emily and that the latter would die without issue surviving, the waiver would not have led to an intestacy.

While there is much force in the argument of the learned counsel for the heirs of Helen W. Beseler that the testator intended that the whole of the trust fund should remain in his family and was created solely for its members, and that in making provisions for his "legal heirs" he meant that his grandchildren finally should take the fund, and that he did not intend to use language which would benefit his wife's collateral heirs at the expense of his grandchildren, still we must construe this will in view of the language used by the testator; and in ascertaining his intention the familiar and well established rules of construction are to be followed so far as they aid in determining the meaning of the language used.

We find nothing in the will to show that the testator, in providing for the final distribution of the fund, used the words "legal heirs" in a different sense from that of the same words when they were employed by him in disposing of the income. The will seems clearly to express the intention of the testator to vest the estate in the legal heirs of each daughter at the decease of each respectively.

At the date of the death of Emily U. Emerson her mother was her legal heir. *Upham v. Emerson*, 119 Mass. 509.

The fact that upon the death of the widow and all the daughters the trustee is to convey, assign and transfer the estate to the legal heirs and that there are no words of present gift, does not show that the testator intended to postpone the vesting of the remainder until the time of distribution or contrary to the general rule.

The direction "to convey, assign and transfer" does not affect the title, but only the time when the donee is entitled to possess-

sion. *Welch v. Blanchard*, 208 Mass. 523, 527. *Jewett v. Jewett*, 260 Mass. 310. *Whall v. Converse*, 146 Mass. 345.

As was said by this court in *Gray v. Whittemore*, 192 Mass. 367, 380: "In each of the cases in which such heirs take under the limitations of this will, they are necessarily to be determined at the death of the particular child in question."

It does not appear, as argued by counsel for the Beseler heirs, that the testator intended to limit the distribution of his estate to his own descendants. He must have known that the heirs of his daughters would be ascertained at the death of each, and that it might happen that some portions, if not all, of the estate eventually might pass into the possession of those who were strangers in blood to him. He was desirous of providing for the care and maintenance of his wife and children, and having accomplished that purpose, was willing that the shares of his daughters should pass to their heirs. In other words, after creating the life estates for the benefit of the daughters he was content to let the law take its course as to the final distribution of the estate.

As one fourth of the income has been added to the remainder in accordance with the decision in *Upham v. Emerson, supra*, such accumulations of income are to be treated as principal and distributed as such. *Upham v. Emerson, supra*. It follows that Harriet M. Emerson, at the date of her decease, was vested with a remainder equal to one twelfth of the estate as heir at law of her daughter Emily. Gen. Sts. c. 91, § 1.

Emily U. Emerson died also owning three thirty-sixths of the estate as intestate property, and upon her death Harriet M. Emerson, as one of her heirs, became entitled to one half of Emily's share, or three seventy-seconds of the estate.

The total share in the estate which the executor under the will of Mrs. Emerson is entitled to is therefore one twelfth and three seventy-seconds, or one eighth of the whole estate in the hands of the trustee.

The heirs of Helen W. Beseler are entitled to share in the remainder of the estate in the following proportions: Estate of Emily A. Beseler, eight twenty-sevenths; Frederick W. Beseler, eight twenty-sevenths; George E. Beseler, eight twenty-sevenths; and William Beseler, three twenty-sevenths.

The decree on the bill of Henry Parkman, trustee, so far

as it directs the trustee to pay over the fund belonging to the trust held by him to Thomas Upham for distribution, is hereby affirmed; but it is reversed so far as it designates the persons to whom the fund is to be distributed and the proportions thereof.

The decree entered in the Probate Court upon the petition of Thomas Upham is reversed and a decree is to be entered in accordance with this opinion; and the case is remanded to the Probate Court for further proceedings.

Ordered accordingly.

J. M. Hollowell, (G. L. Mayberry with him,) for the defendant Florence T. Olliff.

E. F. Fish, for the defendant Frank M. Parker, executor of the will of Harriet M. Emerson and one of her next of kin.

A. Hemenway & G. L. Hemenway, for the defendants Beseler.

A. Fuller, for the defendant Robert E. Parker, submitted a brief.

MARY T. FITZSIMMONS vs. HARRIET C. HALE.

JOHN H. FITZSIMMONS vs. SAME.

Suffolk. October 6, 7, 1914. — March 4, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COUBCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Invitation, In maintaining common stairway.

In an action, against the person in control of a building and of its common stairways which were used by his tenants occupying different portions of the building, for personal injuries caused by a defect in a back stairway which the plaintiff was descending, after having made some purchases at a meat market on the street floor of the building, when she was returning the same way she came by going down the back stairs to the ground that formed the floor of the basement of the building, where the only questions in dispute were whether the plaintiff had been invited to use the rear entrance instead of that from the street in going to and returning from the market as a customer and whether the proprietor of the market had authority from the defendant to give such an invitation, there was evidence that the proprietor of the market was a tenant at will of the defendant and paid rent from month to month, that in the spring preceding the month of July in which the accident happened this tenant with the knowledge of the defendant had put a canvas sign bearing his

name and the words "provisions and groceries" on the building near the rear entrance, although this sign afterwards was blown down and was not replaced, that from the beginning of his tenancy to the time of the accident a number of his customers went to and came from his market on every week day by means of the rear entrance, that the defendant's agent, who collected the rent monthly, "was on the premises frequently and could see what was going on," and that the rear entrance was over a common stairway in the control of the defendant which was maintained by him for the use of all his tenants. *Held*, that a jury could have found that the plaintiff at the time she was injured was using the stairway by invitation, that the defendant knew of the use which his tenant's customers were making of the rear entrance from the time the tenancy began, and that such use was contemplated by the defendant under the original letting, so that the defendant could be held liable to the plaintiff for any neglect of proper precautions to keep the stairway in as good condition as it was in, or had appeared to be in, at the time of the letting.

CROSBY, J. These were two actions of tort. The first is brought to recover for personal injuries received by the plaintiff, and the second, brought by the husband of the first plaintiff, is to recover for amounts expended by him for medical attendance, medicines, and the nursing of his wife. Where the plaintiff is referred to it is to be understood as applying to the female plaintiff.

It is admitted by the defendant that she was "in control of the building numbered 193 A Massachusetts Avenue" in Boston; that she "leased out certain numbers of said building numbered as aforesaid, and reserved to herself the care and control of the common hallways in said building and the steps or stairs leading thereto; that there was evidence of the due care of the plaintiff, Mary T. Fitzsimmons, and of the defendant's negligence, as to persons rightfully on the stairs or steps, in permitting the stairs or steps upon which the plaintiff was injured to remain in a defective condition; and that the plaintiff, Mary T. Fitzsimmons, was injured."

This stairway led up from the ground which formed the floor of the basement of the building to the rear entrance of a meat market of one Magee, who was a tenant of the defendant, and to the floors above. The main entrance to this market was on Massachusetts Avenue at the level of the sidewalk of that street. The plaintiff, who was employed in a laundry in the building adjoining that of the defendant, left the laundry by the rear door, crossed the area behind these buildings, and ascended the common stairway at the rear of the meat market. After making some purchases in the market, she came out, and while descending the

stairs was injured by the breaking of one of the steps. The tenant Magee occupied his market as a tenant at will, and paid rent from month to month.

There was evidence to show that in the spring of 1910 the tenant Magee put up a canvas sign on the building, near the rear entrance of his store; that it was there with the knowledge of the defendant, and afterwards was blown down. It does not appear how long the sign was up, or that the plaintiff ever saw it or knew of its existence. Still, if the sign was maintained at the rear entrance of the meat market, that was evidence having some tendency to show an invitation on the part of the tenant to the public to enter and leave the market by means of the rear entrance. The weight of this evidence was for the jury. *Fogarty v. Bogart*, 43 App. D. (N. Y.) 430; 60 N. Y. Supp. 81. We do not mean to intimate that the maintenance of a sign upon a building is always evidence of an invitation to enter the building. It is common knowledge that signs frequently are placed upon buildings solely for advertising purposes, under such circumstances as to be apparent that no invitation to enter the premises in a particular way could be inferred.

There was further evidence to show that from the beginning of Magee's tenancy to the date of the accident, which occurred in July, 1910, several persons went to and came from the market daily (except on Sundays) by means of the rear entrance; and that such persons, including both men and women, made purchases in the market.

The plaintiff testified that she had "seen for the last four or five years, ladies and gentlemen going in and out making purchases, going in the rear way and coming out the rear way;" that some days she had seen six or seven, some days three or four, and some days two, and some days nine or ten. She further testified: "I thought I could use the same advantage what they did, . . . I did it for short."

There was evidence from one Hannah Scannell that she had seen customers go in and out of Magee's store by this rear entrance for the past seven years.

Magee, the tenant, testified that there was no "special agreement with Mrs. Hale, the defendant, or her agent" as to the use of the two doors (front and rear); "nothing was said about it;"

and that "at no time since I have been there has there been any restriction of people coming in the rear way if they chose to," and "a very small percentage came in the back way; that percentage was more or less regular; it had continued since I had been there."

Magee also testified on his direct examination that "I never solicited patronage in that way," meaning by the rear door; but on re-direct examination he testified not only that he never refused to wait on anybody because they came in by the rear door, but "I had a sign there, I think it was in the spring of 1910; it was a canvas sign; it was a light affair and it finally blew down; the reading of the sign was my name and 'provisions and groceries.'"

Putting up this sign and evidence that customers had been coming in and out of the rear door daily from the beginning of his tenancy, would have warranted a finding that there was an invitation on the part of Magee to his customers to use the rear door in coming to trade at his meat market.

The next question presented is: Did the tenant have the right as against the landlord to invite customers to use the rear door and the common stairway which was reserved for the use of the different tenants? As was pointed out by Loring, J., in *Domenicis v. Fleisher*, 195 Mass. 281, 283: "There are a number of cases in this Commonwealth in which a member of the tenant's family has been allowed to recover for a negligent act of the landlord. *Looney v. McLean*, 129 Mass. 33. *Shute v. Bills*, 191 Mass. 433. *Andrews v. Williamson*, 193 Mass. 92. . . . There are also cases where one who has come on the leased premises on business with the tenant has been held to be entitled to recover for negligence on the part of the landlord under circumstances under which the tenant would have been entitled to recover. *Wilcox v. Zane*, 167 Mass. 302. *O'Malley v. Twenty-Five Associates*, 170 Mass. 471. *Roche v. Sawyer*, 176 Mass. 1. *Jordan v. Sullivan*, 181 Mass. 348."

There was nothing in the terms of the contract creating the tenancy at will, under which Magee was in occupation, defining the class of persons to whom Magee, as against the landlord, had a right to extend an invitation to use these steps and the rear door in coming to his market to trade. Under these circumstances the conduct of the landlord (the defendant) and of Magee (the tenant) may be resorted to to determine what was within their

contemplation under the original contract of lease. If the landlord knew of the use made of the rear door by Magee and his customers and did not object to it, in the opinion of a majority of the court that would be conduct on her part which could be resorted to to determine the class of persons to whom as against the landlord Magee had a right to extend an invitation to use the rear door under the original contract of letting.

The tenant Magee testified that "the sign was there since the Hale people had charge of the building and was there with their knowledge." He also testified: "I don't know whether the agent or proprietor of the building knew the method in which I conducted my business; the rent was collected on the premises; the agent was on the premises frequently and could see what was going on." It also appeared that the tenant had no lease; that he paid the rent from month to month, and was a tenant at will. From the frequency of the use testified to by the plaintiff and Hannah Scannell, the jury could have found that an agent (who collected the rent on the premises monthly and who was on the premises frequently) knew the custom. In this connection it is to be borne in mind that this rear entrance was over steps and stairs in the control of and maintained by the defendant as a common stairway for the use of all her tenants; and the defendant or her agent was obliged at all times to see that these stairs or steps were kept in as good repair as they were in, or appeared to be in, at the time Magee's tenancy began, which means such condition as they would appear to be in to a person of ordinary observation. *Andrews v. Williamson*, 193 Mass. 92. In view of the evidence considered in the light of this continuing obligation upon the defendant, a majority of the court are of opinion that the jury could have found that the defendant knew of the use which the tenant's customers were making of the rear entrance from the time the tenancy began.

It is not pretended that the defendant or her agent ever objected to the use made by Magee and his customers of the rear door.

It follows (in the opinion of a majority of the court) that the jury could have found from the conduct of the parties that the use of the rear door by Magee's customers was contemplated by the landlord under the original letting.

If the jury found that the use actually made of the rear stairway by customers of the tenant was contemplated and intended

by the defendant when the tenancy began, she is liable for any neglect of proper precautions to keep it in as good a condition as it was in, or appeared to be in, at the time of the letting, for persons rightfully using it, aside from the question whether Magee is liable or not. *Domenicis v. Fleisher*, 195 Mass. 213. *Noonan v. O'Hearn*, 216 Mass. 583. *Morong v. Spofford*, 218 Mass. 50. This case is to be distinguished from *Bowler v. Pacific Mills*, 200 Mass. 364; *Norris v. Hugh Nawn Contracting Co.* 206 Mass. 58; and *Hillman v. Boston Elevated Railway*, 207 Mass. 478.

A majority of the court are of opinion that the exceptions should be sustained and judgment entered in accordance with the agreement of the parties.* Accordingly judgment is to be entered for the plaintiff in the first case for \$350, and for the plaintiff in the second case for \$1, without costs in either case.

So ordered.

The cases were argued at the bar in October, 1914, before *Rugg, C. J., Loring, Sheldon, De Courcy, & Crosby, JJ.*, and afterwards was submitted on briefs to all the justices then constituting the court.

John Wentworth, (J. P. Magenis with him,) for the plaintiff.

C. S. Knowles, for the defendant.

* The cases were tried together before *Raymond, J.*, who at the close of the plaintiff's evidence ordered verdicts for the defendant. The plaintiffs alleged exceptions, containing an agreement of the parties, above referred to, that, if the exceptions were sustained, judgment might be entered for the plaintiff in the first case in the sum of \$350 and for the plaintiff in the second case in the sum of \$1, in each case without costs.

COMMONWEALTH vs. JOHN D. CRONAN.

Worcester. January 11, 1915. — March 4, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Practice, Criminal, Exceptions. Intoxicating Liquors. Evidence, Competency, Admissions and confessions.

Upon exceptions alleged by a defendant convicted under R. L. c. 100, § 1, on a complaint for keeping intoxicating liquors with intent to sell them unlawfully, where at the trial the presiding judge properly had allowed the Commonwealth to show an unlawful transportation and delivery by the defendant of the intoxicating liquors in question in a town in which licenses of the first five classes were not granted in violation of R. L. c. 100, § 49, as amended by St. 1912, c. 201, for the purpose of proving by this and other evidence a sale of the liquors by the defendant and consequently a keeping of them by him with intent to sell them unlawfully, a statement in the bill of exceptions, that "the case was prosecuted under section forty-nine of chapter one hundred of the Revised Laws as amended by chapter two hundred and one of the Acts of 1912," is only correct in the sense that a violation of § 49 as amended constituted a part of the evidence and gives the defendant no right to base an argument on the contention that he was convicted of a violation of that statute.

At the trial of a complaint under R. L. c. 100, § 1, for keeping intoxicating liquors with intent to sell them unlawfully, evidence that certain packages in the possession of the defendant were marked "Ale and Porter" is competent to show that the packages contained those liquors.

At the trial of a complaint under R. L. c. 100, § 1, for keeping intoxicating liquors with intent to sell them unlawfully, ale and porter by § 2 of the same chapter are to be deemed intoxicating liquors.

At the trial of a complaint under R. L. c. 100, § 1, for keeping intoxicating liquors in a certain town with intent to sell them unlawfully, where there was evidence that the defendant was engaged in carrying on a general express business under the name Interstate Express Company, and that the intoxicating liquors in question were shipped from Providence in the State of Rhode Island by a Providence express company and were consigned to the Interstate Express Company, a bill of lading issued by the shipper to the Providence express company, containing the names and addresses of four persons other than the defendant, opposite each of which were written in figures certain quantities of liquor, was admitted in evidence by the presiding judge as tending to show that the intoxicating liquors were at the time of the alleged offence in the town in which they were alleged to have been kept with unlawful intent, the judge instructing the jury that the bill of lading by itself had no tendency to show that the liquors were in the possession of the defendant. *Held*, that the bill of lading was admitted properly for the purpose to which it was limited.

In the same case a freight receipt for the intoxicating liquors in question signed "Interstate Express Co. by" certain initials was admitted in evidence. There

was evidence that a person whose initials were signed to the receipt was an employee of the Interstate Express Company and took the packages of liquors from the Providence express company. *Held*, that this receipt, in connection with other evidence, was admissible to show that the liquors came into the possession and control of the defendant.

At the trial of a complaint under R. L. c. 100, § 1, for keeping intoxicating liquors in a certain town with intent to sell them unlawfully, the Commonwealth for the purpose of showing the defendant's unlawful intent sought to show that he had violated R. L. c. 100, § 49, as amended by St. 1912, c. 201, in regard to the transportation of intoxicating liquors in towns in which licenses of the first five classes were not granted. There was evidence that at the time of the alleged offence the defendant was engaged in carrying on a general express business and that while doing so he kept a book such as was required by the statutes last mentioned in case the town in question was a no-license town. This book, which was put in evidence, was marked with the name in which the defendant carried on the express business and certain pages material to the case were headed "Liquor shipments delivered at no-license cities and towns in Massachusetts." *Held*, that, although this evidence was not competent to prove directly that the town in question was a no-license town, because that could be proved directly only by a record of the vote of the town, yet the evidence was admissible as an admission by the defendant that the town in question was a no-license town and that he had delivered liquor there.

Upon a complaint under R. L. c. 100, § 1, for keeping intoxicating liquors in a certain town with intent to sell them unlawfully, evidence, which warranted a finding that the defendant in violation of R. L. c. 100, § 49, as amended by St. 1912, c. 201, made a delivery of the intoxicating liquors in the town in question which under the terms of that statute must be deemed to have been a sale, is evidence that he kept the liquors illegally.

CROSBY, J. The defendant was charged with keeping and exposing for sale in the town of Milford intoxicating liquors on June 24, 1914, and during the three months next before the making of the complaint, with intent unlawfully to sell the same.* The bill of exceptions recites that "The case was prosecuted under section forty-nine of chapter one hundred of the Revised Laws as amended by chapter two hundred and one of the Acts of 1912."

While the Commonwealth offered evidence tending to show a violation of R. L. c. 100, § 49, as amended by St. 1912, c. 201, still the complaint upon which the defendant was tried was for a violation of R. L. c. 100, § 1. The contention of the defendant that he was convicted of an offence in violation of § 49, as amended, cannot be sustained.

* The defendant was tried on this charge before *Sanderson, J.*, who refused to order a verdict for the defendant. The defendant was convicted, and alleged exceptions, raising the questions that are stated in the opinion.

The presiding judge in his instructions to the jury carefully and repeatedly stated that the charge against the defendant was keeping intoxicating liquors with intent to sell the same, and after referring to St. 1912, c. 201, and reading it to the jury, pointed out that before a delivery of intoxicating liquors could be deemed to be a sale the delivery must be of such liquors as are referred to in the statutes, and by a person doing a general express business, and that the liquors must have been delivered either to a person other than the owner or consignee whose name is marked on the vessel or package, or to some other place than is marked thereon.

The evidence of a violation of the statute was allowed by the judge to be considered by the jury with the other evidence as evidence of a sale and so evidence of illegal keeping of intoxicating liquors, which was the offence charged. It was only in that sense that the case was prosecuted under R. L. c. 100, § 49, as amended.

The judge, after referring to violations of R. L. c. 100, § 49, as amended, by persons engaged in a general express business, said: "You ought, perhaps, at the outset of this case to understand clearly that you are not trying a man for conducting an illegal express business. . . . This is not a complaint of that kind. The complaint here is charging this defendant with keeping liquor with the intention of selling it, and so you ought to be sure that you have that in mind in considering all the evidence in the case and its bearing upon that allegation."

1. The receptacles which contained the liquors alleged by the Commonwealth to have been illegally kept by the defendant were marked "Ale and Porter." These markings were competent evidence for the jury as to their contents. *Commonwealth v. Blood*, 11 Gray, 74. *Commonwealth v. Jennings*, 107 Mass. 488. *Commonwealth v. Dearborn*, 109 Mass. 368. *Commonwealth v. Patten*, 151 Mass. 536. Ale and porter are deemed to be intoxicating liquors within the meaning of the statute. R. L. c. 100, § 2. The defendant's exception to the admission of the evidence as to the markings must be overruled.

2. There was evidence that the defendant was engaged in carrying on a general express business at the time of the alleged offence, under the name of the "Interstate Express Company." There was also evidence that the liquors in question were shipped from Providence, Rhode Island, to Milford, in this Commonwealth,

by the Electric Express Company and consigned to the Interstate Express Company. The bill of lading which was issued by the shipper to the Electric Express Company contained the names and addresses of four persons, opposite each of which were given certain quantities of liquor. The bill of lading was admitted in evidence subject to the defendant's exception.

We are of opinion that it was admissible. It was a necessary part of the Commonwealth's case to show that the intoxicating liquor alleged to have been illegally kept was in the town of Milford at the time alleged. The bill of lading was admissible as bearing upon that question, although this evidence of itself had no tendency to show that the liquor was in the possession of the defendant and the judge so instructed the jury.

So too the freight receipt purporting to be signed "Interstate Express Co. L. F. G." was admissible. There was evidence that one Larry Gillam was an employee of the Interstate Express Company and took these packages from the Electric Express Company and unloaded them upon the premises of the Interstate Express Company. This receipt, in connection with the other evidence, was admissible to show that the liquors came into the possession and control of the defendant. Besides, the defendant produced and offered in evidence in his cross-examination of one of the witnesses for the Commonwealth a book kept by the Interstate Express Company, which contained a record that could have been found to be a record of the liquors in question.

3. The defendant contends that there is no evidence that the town of Milford, in the year 1914, was a town in which licenses of the first five classes were not granted, and that therefore the defendant cannot be convicted for a violation of R. L. c. 100, § 49, as amended by St. 1912, c. 201. As we have seen, the defendant was not charged with a violation of these statutes, and was not convicted for such violation. There was evidence that at the time covered by the alleged offence the defendant was in the general express business, and so far as appears that evidence was not disputed at the trial. There was also evidence that during this time he kept a book such as was required by the statute, if Milford was a town where licenses of the first five classes had not been granted. The defendant offered in evidence this book at the trial. It was marked "Property of the Interstate Express Com-

pany." Photographic copies of the pages material to this case were made a part of the exceptions. These pages are entitled "Liquor shipments delivered at no-license cities and towns in Massachusetts." This was not evidence competent to prove that Milford was a no-license town. That fact can be proved as a matter of evidence only by the record of the vote. But this evidence was in the nature of an admission by the defendant that Milford was a no-license town. He, being in the general express business, was under no obligation to keep such a book if licenses of the first five classes had been granted there. This evidence in substance was an admission by the defendant that he had delivered liquor in the no-license town of Milford.

4. As the presiding judge submitted to the jury evidence of a violation of R. L. c. 100, § 49, as amended, it was a material issue whether there was any evidence sufficient to warrant a finding that there was such a violation. We are of opinion that there was such evidence and that the jury could have found that there was such a delivery of intoxicating liquors by the defendant's servants and agent as might be deemed to be a sale. If so, such sale would be evidence that the liquors were kept illegally.

There was evidence that the liquors were delivered to some one, although it was agreed that none of the persons whose names appeared upon the bill of lading ever ordered, saw or received the consignment written thereon. There was evidence that these deliveries were made by McAvoy and Reynolds to persons other than the owners or consignees whose names were marked by the seller or consignor on the packages, and that McAvoy and Reynolds were acting as agents for the defendant, by his authority and with his consent, while he was carrying on a general express business. If so, such a delivery would be deemed to be a sale under the statute.

5. Without reciting the evidence in any greater detail, we are of opinion that a verdict could not have been ordered for the defendant, but that the evidence of a violation by the defendant of R. L. c. 100, § 49, as amended by St. 1912, c. 201, together with the other evidence in the case, was properly submitted to the jury upon the issue whether the defendant kept intoxicating liquor with intent to sell the same unlawfully.

The instructions of the presiding judge seem to have carefully

guarded the rights of the defendant, and no error appears in the conduct of the trial.

The entry must be

Exceptions overruled.

The case was submitted on briefs.

J. E. Swift & T. L. Walsh, for the defendant.

J. A. Stiles, District Attorney, & *E. T. Esty*, Assistant District Attorney, for the Commonwealth.

EMILE F. BERGERON, petitioner.

Suffolk. January 22, 1915. — March 4, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Attorney at Law. Rules of the Board of Bar Examiners. Supreme Judicial Court.

St. 1914, c. 670, amending R. L. c. 165, § 40, as previously amended by St. 1904, c. 355, § 1, whereby the board of bar examiners were authorized to make rules as to the qualifications of applicants for admission to the bar, by providing that such an applicant "shall not be required to be a graduate of any high school, college or university," does not affect Rule 7 of the board of bar examiners, by which a number of ways of satisfying the educational requirements of applicants for admission to the bar other than by being a graduate of a high school, college or university are established.

Whether St. 1914, c. 670, providing "that an applicant for admission to the bar shall not be required to be a graduate of any high school, college or university," is constitutional, here was mentioned as a question that had been adverted to in argument which it was not necessary to determine in the present case and in regard to which authorities in other jurisdictions were not in harmony.

When the question is presented to this court, whether a rule prescribing the qualifications of applicants for admission to the bar, which was made by the board of bar examiners and was approved by this court under R. L. c. 165, § 40, as amended by St. 1904, c. 355, § 1, is unreasonable and therefore ought not to be enforced, the previous approval of the rule by this court without the benefit of argument raises no presumption in favor of the rule and the question must be considered as if it were presented for the first time.

Under R. L. c. 165, § 40, as amended by Sts. 1904, c. 355, § 1; 1914, c. 670, Rule 7, made by the board of bar examiners and approved by this court, prescribing certain educational requirements something less in substance than the equivalent of an education in the average high school as a preliminary qualification of applicants for admission to the bar, is not unreasonable nor unduly severe.

Rule 7, made by the bar examiners and approved by this court, prescribing certain educational requirements as a preliminary qualification of applicants for admission to the bar, provided that it should go into effect at a date three years after the date of its approval, by which all persons who had begun their legal studies before the adoption of the rule were given time to complete the usual period of study and to make two attempts to pass the bar examinations before the rule became effective as to them, and this was reasonable notice of the enforcement of the rule.

PETITION, filed in the Supreme Judicial Court on December 26, 1914, for permission to be examined for admission to the bar as an attorney at law in this Commonwealth.

By an order of court the petition was referred to the board of bar examiners to report thereon to the court. The board reported that under the provisions of Rule 7 of the board of bar examiners in regard to general education the applicant was not yet eligible to take a bar examination, and that the provisions of Rule 7 were not in conflict with St. 1914, c. 670, and were still in force as to the question of eligibility.

The case was heard upon the petition and report and an agreed statement of facts by *Pierce, J.*, who ruled that the report should be confirmed, and, at the request of the petitioner, reported the case for determination by the full court.

The case was argued at the bar in January, 1915, before *Rugg, C. J., Loring, Braley, Crosby, & Pierce, JJ.*, and afterwards was submitted on briefs to all the justices.

J. J. Cummings, for the petitioner.

H. R. Bailey, for the board of bar examiners, submitted a brief.

Rugg, C. J. This is a petition for examination for admission to the bar. The facts are these: The petitioner has completed three and two thirds years' work at a high school in Fall River, without having graduated, has spent three years in the study of law at a law school and has graduated with the degree of LL.B., has taken and failed to pass examinations for admission to the bar in June and again in December, 1913, and now desires to take the examination for a third time. He has complied with all the preliminary requirements except that part of Rule 7 of the "Rules of Board of Bar Examiners" relative to "General Education," which was established and approved on March 28, 1911, and took effect on February 2, 1914, and which is printed in a

footnote.* The present petition was filed on December 26, 1914. The petitioner has not complied with any of the provisions of that rule. Being neither a graduate of any such school as is mentioned in (a) and (b), he has not passed the examination prescribed in (c).

It is contended that this rule is abrogated by St. 1914, c. 670, which took effect on September 1, 1914. Section 1 of that act amended R. L. c. 165, § 40, as previously amended by St. 1904, c. 355, § 1, wherein the board of bar examiners were authorized to make rules subject to the approval of the Supreme Judicial Court as to the qualifications of applicants for admission to the bar, by adding the proviso that such an applicant "shall not be required to be a graduate of any high school, college or university." As matter of construction, it is plain that this statute in no way affects the rule. The rule does not require any such qualification as is described in the statute. It simply establishes an educational test which may be met in several ways. One is by being a graduate of a college. Another is by being a graduate of

* "After February 1, 1914, an applicant must show by certificate or certificates that he, —

(a) Is a graduate of a college, or has passed the entrance examinations of a college, or of the College Entrance Examination Board, or examinations substantially equivalent thereto; or has complied with the entrance requirements of a college; or

(b) Is a graduate of a day high school, or of a school of equal grade; or

(c) Has passed the examinations given for admission to the State normal schools of Massachusetts in the following subjects: —

I. Language. — English, with its grammar and literature.

II. United States History. — The history and civil governments of Massachusetts and the United States, with related geography and so much of English history as is directly contributory to a knowledge of United States history.

III. (a) Latin or

(b) French.

IV. (a) Algebra or

(b) Plane Geometry.

V. Any two of the following: —

(a) Physiology and Hygiene,

(b) Physics,

(c) Chemistry,

(d) Botany,

(e) Physical Geography."

a day high school or school of equal grade. But the applicant also may qualify by passing the entrance examinations of a college, or of the college entrance examination board, or of equivalent examinations, or by complying with the entrance requirements of a college, or by passing the examinations for entrance to the State normal schools of Massachusetts in the specified subjects. Thus five ways of satisfying the educational requirements other than by being a graduate of a high school or college are defined.

It has been suggested that the statute must be construed as expressing an intent on the part of the Legislature to compel the bar examiners to cease from enforcing the rule. Doubtless all statutes are to be interpreted in such way as to render effective their manifest purpose. Remedial acts are to be construed so as to afford the relief intended. But no intent can be read into a statute which is not there either in plain words or by fair implication. There are no means of ascertaining the purpose and effect of a statute except from the words used when given their common and approved meaning. They are to be read in the light of attendant conditions and the state of the law existent at the time of their enactment. But they cannot be stretched beyond their reasonable import to accomplish a result not expressed.

It is not necessary to determine the constitutionality of this statute, a question adverted to at the argument, as to which authorities in other jurisdictions are not in harmony, for the reason that the statute does not affect the rule.

It is urged, however, that the rule is unreasonable in itself and hence ought not to be enforced. This presents an important question. The rule was approved by the justices of this court before it was promulgated. That was done without the benefit of argument. It now is the duty of the court to guard most carefully against any influence flowing from previous thought about the matter. The circumstances are analogous to those where the justices of this court have given an advisory opinion under the Constitution to the executive or legislative departments of government and subsequently are obliged to reconsider the same matter as a court between parties litigant. *Green v. Commonwealth*, 12 Allen, 155, 164. *Young v. Duncan*, 218 Mass. 346. The determination of the question is approached with every effort to im-

partiality. It has been considered in a manner as careful and thorough as a sense of judicial duty can impose.

The question thus presented in its broader aspects is whether any qualification in general education reasonably can be required as a prerequisite for admission to the bar. The natural impulse of any believer in a republican form of government is that no barrier ought to be raised against any individual engaging in any pursuit. Unrestricted freedom of choice and absolute equality of opportunity in every employment are elementary principles. Hence, at first sight any restrictions seem contrary to the spirit of our Constitution. But it is apparent that there are limitations imposed by the nature of things which cannot be ignored nor over-leaped. The ignorant cannot undertake a handicraft without training. Statutes in recent years as to plumbers, pharmacists and many branches of the civil service furnish numerous illustrations of the recognition of this principle. The passing of an examination by teachers in the public schools has been required for many years.

The principle of preliminary examinations is thus thoroughly established as well by legislative recognition as in reason. Its proper scope is the only matter to be determined. On that point it becomes necessary to consider somewhat closely the duties of an attorney at law. He is in a sense an officer of the State. From early days he has been required to take and subscribe an "oath of office" which forbids him from promoting and even from wittingly consenting to any false, groundless or unlawful suit, from doing or permitting to be done any falsehood in court, and which binds him to the highest fidelity to the courts as well as to his clients. The courts being a department of government, this is but another way of saying that his obligation to the public is no less significant than that to the client. He is held out by the Commonwealth as one worthy of trust and confidence in matters pertaining to the law. Of course no one can know all law. But every attorney ought to possess learning sufficient to enable him either to ascertain the law or to determine his limitations in that regard for the purpose of giving safe advice. It is impracticable to attempt to name the matters about which he may be asked to act. Stated comprehensively they include the liberty, the property, the happiness, the character and the life of any citizen or

alien. They touch the deepest and most precious concerns of men, women and children. The occasions which lead one to seek the assistance of a lawyer often are emergencies in that person's experience which prevent the exercise of critical discernment in selecting a counsellor. They involve the utmost trust and confidence. In proportion as the client is poor, ignorant or helpless, and hence less likely to be able to exercise judgment in making choice, the necessity of adequate learning and purity of character on the part of every lawyer increases in importance. Thus the interest of the public in the intelligence and learning of the bar is most vital. Manifestly the practice of the law is not a craft, nor trade, nor commerce. It is a profession whose main purpose is to aid in the doing of justice according to law between the State and the individual, and between man and man. Its members are not and ought not to be hired servants of their clients. They are independent officers of the court, owing a duty as well to the public as to private interests. No one not possessing a considerable degree of general education and intelligence can perform this kind of service. Elemental conditions and essential facts as to the practice of law must be recognized in the standards to be observed in admission to the bar.

The right of any person to engage in the practice of the law is slight in comparison with the need of protecting the public against the incompetent. The propriety of requiring some educational qualifications as a prerequisite for admission to the bar seems plain. The exact extent of general education to be required is a matter about which opinions may differ. Indeed, the bar examiners have presented modifications of the present rules for approval by the court, which are now under consideration. But that circumstance has nothing to do with the present petition.

The rule here assailed requires something less in substance than the equivalent of an education in the average high school, as we understand it. It may be satisfied by showing that one is a graduate of a high school or college or has passed examinations which are recognized generally as evidence of the possession of those qualifications. Or it may be met by passing the examinations in designated subjects at the State normal schools. It was stated at the argument that arrangements with the officers in charge of these institutions had been made for the taking of such

examinations by candidates for the bar. There is no unjust discrimination in the rule. Such certificates of graduation are accepted in many institutions of learning as evidence of qualification. The normal school examination, while more restricted as to subjects than the courses in many high schools, affords some range of choice and appears to be reasonable in scope. The educational requirement does not seem unduly severe.

It is urged that it is a requirement which many men who have achieved signal success in the practice of the law could not have met at the time they were admitted to the bar. Doubtless that is true. But requirements which could not have been complied with in remote districts, where facilities for the acquisition of knowledge and general instruction were scanty, hardly can be regarded as a universal standard for other times and places. In this Commonwealth, where there is a free public library in every city and town with a single exception and where every family is within reach of a free public library, where the compulsory school age is high and where provision for learning by day and evening schools is ample, the educational requirement of the rule is not beyond the reasonable reach of those possessing the native ability, the energy and the perseverance necessary to enable them to render moderately valuable service to the public as attorneys.

It may be also that many members of the bar now in practice might not be able to pass such an examination. The mental strength developed by the study necessary to master the required subjects in general education is more significant than the book learning implied. The facts learned may be forgotten, the trained mind remains.

An examination at best is an imperfect standard. But it is the only practicable expedient known for determining intellectual fitness in cases like this. The subjects chosen for this examination are designed to eliminate those whose general intelligence, learning and mental capacity are inadequate to enable them to be useful to that part of the public who may seek their aid. Even if it should happen in rare instances that one who could be a useful attorney should be excluded, that is on the whole far better than to have the public harmed and clients subject to injury which would be irreparable by the admission of considerable numbers of those who are deficient in education and incapable

in fact. There must be a general rule. Almost every general rule of municipal or natural law in some instances appears to work a hardship upon an individual. The law of gravitation acts differently upon the just and the unjust.

All those who had commenced their legal studies before the adoption of this rule were by its terms given time enough to complete the usual period of study and make two attempts to pass the bar examinations before it became effective. Thus reasonable notice was given.

Measured by the standards established in other States, the requirement of this rule is reasonable. It appears from a compilation of the rules for admission to the bar published in 1913 by the West Publishing Company, that there are general educational requirements for admission to the bar in twenty-two States of the Union.* In most of these States graduation at a recognized high school or its equivalent is required, and a certificate of graduation is accepted as evidence of qualification. In Pennsylvania and New York at least the educational requirement is appreciably more severe. In view of all these considerations we are satisfied that the rule is not unreasonable and that the petitioner is not entitled to take the examination as to his legal qualifications until he has passed an examination as to his general education.

So ordered.

* Colorado, Connecticut, Delaware, Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Washington, West Virginia, Wisconsin, Philippine Islands. The examination on legal subjects in Louisiana appears to demand a considerable knowledge of Latin and probably of French.

JOHN HERBERT, executor, vs. MALVINA J. SIMSON.

Middlesex. November 10, 1914. — March 8, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Gift. Corporation, Transfer of shares.

Independently of St. 1910, c. 171, § 9, which now provides expressly for such a case, the delivery of an unindorsed certificate of shares in the capital stock of a corporation with the intention of making an immediate gift of the shares and the acceptance of the unindorsed certificate by the donee as his property pass to the donee the equitable title to the shares with the right to compel a formal assignment by the donor or by the executor of his will after his death and thereafter a transfer on the books of the corporation.

The provision printed on a certificate of shares in the capital stock of a corporation that the shares are "transferable only on the books of the company" affects only the relation of the shareholder to the corporation and does not affect the rights of a third person having an equitable title to the shares.

BILL IN EQUITY, filed in the Probate Court of the county of Middlesex on November 13, 1911, by the executor of the will of Adeline L. Nickerson for instructions as to the disposition to be made by him of a certificate for ten shares of the preferred stock of the American Agricultural Chemical Company, a corporation established under the laws of the State of Connecticut, held by him as executor and claimed by the defendant as a gift made to her by the testatrix in her lifetime.

The Probate Court made a decree that no gift of the shares of stock had been made to the defendant and that the shares were assets of the estate in the hands of the plaintiff. The defendant appealed.

The appeal was heard by *Loring, J.*, who made certain findings of fact which are stated in the opinion, and at the request of the parties reserved the case for determination by the full court upon the findings made by him.

J. Herbert, executor, stated the case.

T. W. Proctor, for the defendant Malvina J. Simson.

H. W. Orcutt, for the defendants Rosetta L. Cook and Rebecca C. Fielding.

DE COURCY, J. It is settled by the finding of the single justice that on the fifth day of December, 1908, for the reasons set forth in the reservation, Mrs. Nickerson undertook to make a gift to Mrs. Simson of ten shares of the preferred stock of the American Agricultural Chemical Company; that pursuant thereto she delivered the unindorsed certificate for the shares to Mrs. Simson, who then accepted it on the terms on which it had been delivered to her. Thereafter it was kept by Mrs. Simson in her trunk in her own room. The question before us is whether the alleged gift was incomplete, and therefore ineffectual, because of the failure on Mrs. Nickerson's part to assign the certificate by signing the form on the back thereof, or by executing some other written instrument.

The charter and by-laws of the corporation contain no provision concerning the transfer of certificates of shares; and no statute of the State of its incorporation has been called to our attention that affects the question. No rights of creditors or other third parties are involved, but only those of donor and donee. It should be added that St. 1910, c. 171, § 9, which provides for such a case as this, was passed after the gift in controversy.

The failure of Mrs. Nickerson to indorse the share certificate was important evidence bearing on the intention with which the delivery was made; but it is settled by the finding of the single justice that she did in fact intend to make a completed gift and irrevocably to renounce dominion and control of the stock, and that Mrs. Simson accepted it as her own property. Nevertheless, without the written assignment Mrs. Simson did not acquire the legal title to the shares, — the ownership in the sense that no further act was required to perfect her right. *Fisher v. Essex Bank*, 5 Gray, 373. *Stone v. Hackett*, 12 Gray, 227. Note to *Milroy v. Lord*, 1 Ames, Cases on Trusts, 149. What she did acquire was, as between herself and the donor, the equitable title to the shares and some legal as well as equitable rights. The gift was complete, and not inchoate; and a court of equity has jurisdiction to compel a formal assignment by the executor of the donor, and a transfer on the books of the corporation.

The general rule is now well established that choses in action, of which the legal or equitable title can pass by delivery, may be the subject of a valid gift. And the delivery of the chose in

action, without formal indorsement or assignment, is sufficient to effectuate the gift where it is the intent and purpose of the donor to transfer the ownership at once. The principle has been applied by this court to the gift of a promissory note, payable to the order of the donor and not indorsed. *Grover v. Grover*, 24 Pick. 261. It was held in *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425, that the delivery of a savings bank book (which is analogous to a stock certificate in many respects), without a written assignment or order, was sufficient to constitute a valid gift. A share of capital stock is property of a peculiar kind. Accurately speaking it does not consist in an interest either legal or equitable in the property of the company. It is personalty although the corporation may own real estate. If not a chose in action it is in the nature of a chose in action. The share certificate is evidence of title, and for some purposes may possess some of the incidents of property. While not negotiable, shares are freely assignable and in this respect resemble negotiable choses in action and tangible property rather than other non-negotiable choses in action. As was said by Rugg, C. J., in *Kennedy v. Hodges*, 215 Mass. 112, 115: "Modern commercial usage treats certificates of stock as possessing some of the attributes of property. They are generally bought and sold and pass by delivery when properly indorsed like ordinary chattels." There is nothing in the nature of a share of stock to prevent the passing of the equitable title to the share, as between the donor and donee, by the delivery of the share certificate, where such is the manifest intent of the parties.

The question now before us has not been decided in this Commonwealth, although it arose in *Morse v. Meston*, 152 Mass. 5. But in the large majority of cases where it has arisen in other jurisdictions in this country it has been decided that the delivery of the share certificate, with the intention of passing title to the donee at the time but without formal assignment, will constitute a valid gift. *Brown v. Crafts*, 98 Maine, 40, 44. *Bond v. Bean*, 72 N. H. 444. *Reed v. Copeland*, 50 Conn. 472. *Walsh v. Sexton*, 55 Barb. 251. *Gilkinson v. Third Avenue Railroad*, 47 App. Div. (N. Y.) 472. *Commonwealth v. Crompton*, 137 Penn. St. 138. *First National Bank of Richmond v. Holland*, 99 Va. 495. *Smith v. Meeker*, 153 Iowa, 655. *Leyson v. Davis*, 17 Mont. 220; S. C. 170 U. S. 36. And see *Burnsville Turnpike Co. v. State*, 119

Ind. 382, 385; *Ridden v. Thrall*, 125 N. Y. 572; *Talbot v. Talbot*, 32 R. I. 72; *Watson v. Watson*, 69 Vt. 243; *contra*, *Matthews v. Hoagland*, 3 Dick. 455; *Baltimore Retort & Fire Brick Co. v. Mali*, 65 Md. 93.

The injustice of a contrary conclusion is well expressed by Dean Ames in his note to *Milroy v. Lord*, *ubi supra* (p. 156): "Even in jurisdictions where the gift is ineffectual unless the shares, or deposit, are transferred on the books of the company or savings bank, the donor would not be allowed to recover the certificate or bank book after he had once delivered them with the intention of vesting them in the donee. . . . We should have, then, this extraordinary condition of things: the donee unable to transfer the shares or collect the deposit, because the gift is not deemed complete; the donor equally helpless, because he cannot produce the certificate or bank book; the company or bank, on the other hand, in a position capriciously to recognize the donor or the donee as *dominus* of the claim, or, indeed, unless they come to some compromise, to refuse with safety to recognize either."

We are of opinion that the delivery by Mrs. Nickerson to the defendant of the share certificate and its acceptance by the latter constituted a valid gift and vested in the donee the equitable title to the property. The provision printed on the certificate that the shares are "transferable only on the Books of the Company," affects the shareholder's relation to the corporation only, and not her relation to a third party who has become equitably possessed of the stock. See cases cited in Ann. Cas. 1912 C 1235, note.

The decree of the Probate Court is reversed, and a decree is to be entered instructing the executor that the certificate for ten shares of the preferred stock of the American Agricultural Chemical Company is the property of the defendant Malvina J. Simson, and directing him to assign the same to her.

Ordered accordingly.

BOSTON SAFE DEPOSIT AND TRUST COMPANY, trustee, vs.
FANNIE L. LUKE & trustee.

Suffolk. January 13, 1915. — March 9, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Trust, Spendthrift. Bankruptcy.

The interest of an adopted daughter of a testator under the provisions of a trust created by his will which required that the whole net income of the trust fund should be paid to her quarterly during her life "together with such portion of the principal of said trust fund as shall make the amount to be paid her at least \$3,000 a year during her life, said income to be free from the interference or control of her creditors," although it is assignable because there is nothing in the will which forbids its assignment, is not affected by the adopted daughter being adjudicated a bankrupt, and the trustee under the will should pay to her and not to the trustee in bankruptcy of her estate the income of the fund accruing after such adjudication.

BILL IN EQUITY, filed in the Supreme Judicial Court on April 7, 1914, by the trustee under the will of John W. Leighton, late of Brookline, seeking instructions as to whether the interest of the defendant Fannie Leighton Luke under the clause of the will quoted below passed to the trustee in bankruptcy of her estate.

The clause of the will in question was as follows :

"Second: I give, devise and bequeath to the Boston Safe Deposit and Trust Company, a corporation duly established under the laws of the Commonwealth of Massachusetts and located at Boston, in said Commonwealth, the sum of Seventy-five Thousand Dollars in money, but in trust nevertheless, to invest, hold, re-invest and manage the same separate and apart from all other property held by it in trust, and pay over the net income and principal thereof as follows:

"(1) The whole of the net income thereof to be paid my adopted daughter, Fannie Leighton Luke, wife of Otis H. Luke, of said Brookline during her life quarterly in each and every year together with such portion of the principal of said trust fund as shall make the amount to be paid her at least Three Thousand Dollars a year during her life, said income to be free from the interference or control of her creditors."

The testator died in 1897. Fannie Leighton Luke was adjudicated a bankrupt on December 3, 1913.

The case was reserved by *De Courcy, J.*, for determination by the full court.

H. F. Atwood, for the plaintiff, stated the case.

R. H. Oveson, for the defendant Fannie L. Luke.

G. E. Kemp, for the trustee in bankruptcy.

LORING, J. The trustee in bankruptcy seeks to take this case out of the decisions made in *Billings v. Marsh*, 153 Mass. 311, and *Munroe v. Dewey*, 176 Mass. 184, because the bankrupt's equitable life interest in the case at bar was assignable. There is nothing in the will which forbids the life tenant's assigning her equitable life interest. It follows that it was assignable. *Ames v. Clarke*, 106 Mass. 573. *Huntress v. Allen*, 195 Mass. 226.

It is the contention of the trustee in bankruptcy that, being assignable, the life interest passed to him under § 70 a (5) of the bankrupt act, which provides that all "property which prior to the filing of the petition he [the bankrupt] could by any means have transferred" shall vest in the trustee.

But the immunity of the equitable life interest in the case at bar does not depend upon the kind of property which (by the terms of the bankrupt act) passes to the trustee in bankruptcy. The immunity of the equitable life interest goes farther back. It goes back to the fact that this equitable life interest is not subject to bankruptcy proceedings at all. By the terms of the will creating it the equitable life interest here in question is to be "free from the interference or control of her [the life tenant's] creditors." It is immaterial whether the machinery set in motion by the creditors is a bill in equity to reach and apply her equitable interests, or an involuntary petition in bankruptcy to secure all her property legal and equitable. The equitable life estate created by the will here in question is to be "free from the interference or control of her creditors," and under the doctrine of *Broadway National Bank v. Adams*, 133 Mass. 170, that direction will be enforced. We have examined all the cases cited by the trustee in bankruptcy and find nothing in them which requires notice.

By the terms of the will "the whole of the net income" is to be "free from the interference or control of her [the life tenant's]

creditors." The whole income, including all arrearages, is to be paid to the life tenant.

No question has arisen requiring the court to instruct the trustee as to the use of the principal to make the income up to \$3,000.

A decree must be entered directing the plaintiff to pay to the life tenant the whole income, including all arrearages; and it is
So ordered.



FREDERICK E. SHAW, assignee, vs. UNITED SHOE MACHINERY COMPANY & another.

Suffolk. January 19, 1915. — March 9, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Assignment, For benefit of creditors. Contract, Construction. Insolvency.

Where one has possession of machinery under agreements in writing in the nature of leases or license agreements which among other things provide that, "if the lessee . . . executes any . . . assignment for the benefit of his creditors . . . all leases or licenses to use machinery then existing . . . shall at the option of the lessor cease and determine, and the possession . . . of all machinery the leases or licenses of which are so terminated, shall thereupon revert in the lessor free from all claims or demands whatsoever," and also provide that, upon the termination of the leases or agreements, the lessee shall become liable to pay certain return charges and charges for repairs and cartage, if the lessee or licensee makes an assignment for the benefit of his creditors which provides that debts provable thereunder are such as are provable under the insolvency laws of this Commonwealth, and thereafter the lessor or licensor exercises his option and retakes possession of the machines from the assignee and assents to the assignment, the claim of the lessor or licensor for the return charges and charges for repairs and cartage are not claims which he has a right to prove against the estate in the hands of the assignee, because they were not debts "absolutely due" under R. L. c. 163, § 31, at the time of the assignment.

BILL IN EQUITY, filed in the Superior Court on March 23, 1914, by the assignee for the benefit of the creditors of the Burnham Shoe Company, Inc., against two assenting creditors, alleging in substance that the claims proved by the defendants included claims under certain shoe machinery leases or license agreements which the plaintiff had disallowed; that the defendants had refused to accept dividends based on a calculation of their claims

which did not include the amounts disallowed by the plaintiff; that the plaintiff "long since" had "been under obligation to make distribution to the other assenting creditors" and was "now imminently liable to become involved in litigation with them and put to expense . . . and said trust estate thereby dissipated and squandered;" that it was "the duty and obligation of the defendants and each of them as assenting creditors . . . to accept when offered the dividends payable upon their legal and just claims as determinable at the date of said assignment, and not to obstruct, hinder and delay the administration of said estate;" that the plaintiff was desirous of and stood "ready to perform and execute forthwith his full duty under the terms of said assignment, but" wrongfully was prevented by the defendants, to his great damage and annoyance, and that of the other assenting creditors; that the plaintiff had no adequate remedy at law, and that irreparable damage would result unless the relief prayed for should be given.

The prayers of the bill were that the court should construe the provisions of the leases and agreements in question, should determine the rights and liabilities of the respective parties, should ascertain and determine the proper and just amount of the defendants' claims under the provisions of the leases and agreements; that, if the court should be of the opinion that the defendants or either of them were entitled to a dividend upon their charges and claims arising, occurring and accruing after the date of the assignment, the just and true amount or amounts of such claims might be ascertained in accordance with the provisions of the leases "and all the actual facts in respect to each claim," and that the court, after determining the questions involved, should give such instructions to the plaintiff as law and equity and the rights of the parties might require, and direct the defendants "and each of them by a mandatory injunction to accept such dividends as may be finally determined to be justly and legally due them."

The case was heard by *Wait, J.* The material facts found by him are stated in the opinion. The plaintiff asked for the following rulings among others:

"1. The plaintiff as assignee of the Burnham Shoe Company is not a 'legal representative' of the said company within the

meaning of that term as used in the respective leases from the respondents to said Burnham Shoe Company.

"2. The defendants can maintain their respective claims against the plaintiff as assignee in this case for only so much of the same as has arisen and accrued on or before the date when the assignment of the Burnham Shoe Company to the plaintiff became effective.

"3. The assignee is under no obligation to recognize any claim of either defendant based on charges for removing or repairing the leased machinery after the cancellation of the leases by the defendants or after the assignment took effect."

The judge refused to rule as requested, ruled that as a matter of law the defendants were entitled to prove the contested items under the terms of the assignment and the leases and license agreements and to receive *pro rata* dividends on their claims as thus proved, and reported the case for determination by this court.

A. G. Wadleigh, for the plaintiff.

W. B. Farr, (*N. B. Todd* with him,) for the defendants.

CROSBY, J. This is a bill for instructions brought by the plaintiff as assignee for the benefit of the creditors of the Burnham Shoe Company. The question is whether certain claims presented by the defendants are legally provable against the estate.

No question has been raised as to the right of the plaintiff to maintain the bill, and that question is not considered or determined.

We now come to the real question at issue between the parties.

The report of the judge of the Superior Court shows that at the time the Burnham Shoe Company made the assignment to the plaintiff it was in possession of certain machinery used for the manufacture of shoes, and that such machinery was all owned by the defendant the United Shoe Machinery Company, with the exception of one machine which was owned by the United-Xpedite Finishing Company, defendant. This machinery was held and used under certain leases or license agreements entered into between the parties. These leases or agreements contain many provisions relating to the terms and conditions upon which the machinery is to be so held and used. It will not be necessary to consider all these provisions, but only

certain clauses or articles which are substantially the same in all the leases.

The defendants, as unsecured creditors of the Burnham Shoe Company, having received notice of the assignment, duly assented to its terms and presented to the assignee itemized statements of their accounts upon which they sought to recover dividends.

The items in dispute are certain "return charges" on certain machines, — charges for repairs, and freight and cartage charges on machines which were taken by the defendants after terminating the leases.

All of the leases and license agreements provide that "If the lessee becomes insolvent or bankrupt, or has a receiving order made against him, or makes or executes any bill of sale, deed of trust or assignment for the benefit of his creditors, . . . then and in each such case any or all leases of or licenses to use machinery then existing between the lessor and the lessee, . . . shall at the option of the lessor cease and determine, and the possession . . . of all machinery the leases or licenses of which are so terminated, shall thereupon revert in the lessor free from all claims or demands whatsoever."

Under and by virtue of the foregoing provisions in the leases, the lessors, soon after the notice of the assignment to the plaintiff, terminated the leases and licenses by giving proper notice thereof to the proper officers of the Burnham Shoe Company, and the plaintiff was notified of said termination, and allowed the lessors to take possession of the leased machines. The defendants entered and removed the leased property within one month from the date of the assignment.

The notices of termination contained a demand that the lessee forthwith deliver at the office of the lessors in Beverly in this Commonwealth, the machines designated in said leases and licenses and any and all other machines belonging to the lessors which theretofore had been delivered into its possession, enumerating in detail the machines, and stated: "You are hereby notified that in the exercise of our rights in the premises, we have elected and hereby declare our option to terminate all leases and licenses which have heretofore been granted to you covering machines belonging to us, including herein the following leases and licenses, to wit:"

The deed of assignment was in the form of a common law assignment. The third paragraph contained a provision to the effect that the debts provable by creditors of the shoe company were such debts as were provable against the estate of insolvent debtors under the laws of this Commonwealth. The defendants who have assented to the assignment are bound by its terms.

Under our statute, the claims which are legally provable against the estate of an insolvent debtor are, so far as material to this case, defined as follows: "Debts due and payable from the debtor at the time of the first publication of the notice of issuing the warrant may be proved and allowed against his estate at any meeting; and debts at that time absolutely due, although not payable, may be proved and allowed as if payable, with a discount or rebate of interest if no interest is payable by the contract. . . ." R. L. c. 163, § 31.

The question then is whether the disputed items in the respective accounts were provable at the time of the execution and delivery of the deed of assignment; in other words, were these items debts which were due and payable at that time, or were they debts "at that time absolutely due," although not payable?

We are of opinion that when the assignment was made these items were not debts due and payable, nor were they debts at that time absolutely due, although not payable, and that therefore such items were not provable against the assignee.

As we have seen, all the leases contain a provision that they may be terminated at the option of the lessor, if the lessee, *inter alia*, makes an assignment for the benefit of his creditors. It also appears that that option has been exercised by the lessors since the assignment was executed; but as the leases were in full force and effect at the time of the execution of the assignment nothing was then due on account of the items in question. The execution of the assignment did not terminate the leases, but authorized the lessors to end them at their option.

It is manifest that the disputed items were all contingent upon the termination of the leases, and so were in no sense absolutely due from the Burnham Shoe Company, and if the lessor had failed to exercise its option none of these items ever could become due or payable.

The return charges on the Goodyear machines are claimed under

Clause 10 in lease No. 7374, and Clause 11 in leases No. 7374A and No. 7374B. Clause 10 provides that upon the termination of the lease or any extension thereof, the lessee shall pay to the lessor \$150 on each of certain machines therein described. Clause 11 provides in part that upon the termination of the lease the lessee, in addition to all other payments to be made, shall pay the lessor a certain stipulated amount in respect to each leased machine, "provided, however, that in case the lease and license hereby granted shall continue throughout the full term of seventeen years . . . and the lessee at the time of returning the leased machinery at the end of said full term, shall not be in default as to any of the payments under or other conditions, stipulations or provisions of this or any other lease or license agreement between the lessor and the lessee, then the payment in this Article hereof provided for shall not be required to be made."

Under both of the above clauses the time is uncertain as to when the lease will terminate, if at all; and under Clause 11 the payment therein referred to is also made contingent upon conditions which make it doubtful whether any sum ever will become due, even upon the expiration of the lease.

The claim for return charge on the eyeletting machines under lease No. 8205 is under a provision whose language is substantially the same as that of Clause 10 in lease No. 7374 above referred to.

The return charges on the general department machines were claimed under Clause 7 of the general department lease, No. 6217, which provides in part that upon the expiration or termination of the lease the lessee shall pay the lessor in respect to each machine leased a stipulated amount, with the further provision that if the lessee shall have at all times prior to such expiration or termination of the lease kept all of the conditions of the lease and of all other leases between the parties, and is not in default, and shall promptly and fully carry out the obligations incumbent upon the lessee upon such expiration or termination, the payments in this article to be made shall be reduced by an amount equal to one half of the annual payments theretofore made by the lessee under the provisions of article six, "or in case one half of such annual payments theretofore made by the lessee to the lessor in respect to such machine equals or exceeds the payment in this article hereof provided to be made in respect thereto then said payment

under this article hereof in respect to said machine shall be waived."

It will be observed that the amount, if anything, which ever would become due under Clause 7 of lease No. 6217, would be contingent upon the amounts previously paid by the lessee as rent before the expiration of the lease. The various clauses above referred to relate to the "return charges" under which the defendants claim.

It only remains to consider the clause of the leases which entitles the lessor to claim for repairs. This provision is substantially the same in all the leases and provides in part that the term of the agreement shall be seventeen years from the date of the lease. The leased machinery and license to use the same shall continue unless sooner terminated by the lessor, and "if, upon the expiration of the full term of this agreement, the lessor does not request the return of the leased machinery, then the leased machinery shall continue to be held and used under and in accordance with the conditions . . . in this agreement contained and this agreement and the lease and license herein contained shall thereupon be extended indefinitely as to term."

Then follows a provision that upon sixty days' notice given by either party to the other, the lease may be terminated, whereupon the leased machinery shall be delivered forthwith to the lessor at Beverly, and the lessee shall pay the lessor such sum as may be necessary to put the leased machinery in suitable order and condition to lease to another lessee.

The claims for cartage and freight were made under provisions, common to all the leases, that upon the termination thereof the lessee should return all the leased machinery to the lessor at Beverly.

The items in the account of the United-Xpedite Finishing Company are claimed under its lease to the Burnham Shoe Company, No. 2312, Clause 10, which is substantially the same as the clause last quoted, except that the contingent payments provided for are fixed as to amount in this lease.

It is plain that all of the disputed items were contingent upon the termination of the leases, and while they might be terminated in various ways, still, under the clause last above referred to, which is a provision substantially identical in all the leases, there was

no absolute certainty that either of the leases ever would terminate, but they might "be extended indefinitely as to term," if the lessor did not at the expiration of the term "request the return of the leased machinery." Thereafter either party might terminate the lease upon sixty days' notice in writing to the other.

We need not decide whether the language of the federal bankruptcy act (63 a, cl. 1 & 4 of the act), which defines the claims that are provable in bankruptcy, is identical in meaning with the language of our statute defining claims that are provable in insolvency, because we are of opinion that under the decisions of this court which have interpreted R. L. c. 163, § 31, the items in controversy were not, when the assignment was made, provable as debts either due or payable, or as debts at that time absolutely due although not payable. There might or might not be such debts in the future depending upon many contingencies that have been pointed out by reference to the different clauses of the leases in question. *Wood v. Partridge*, 11 Mass. 488, 492. *Bordman v. Osborn*, 23 Pick. 295. *Bangs v. Lincoln*, 10 Gray, 600. *Morton v. Richards*, 13 Gray, 15. *Allen v. Herrick*, 15 Gray, 274. *Thayer v. Daniels*, 100 Mass. 345. *Deane v. Caldwell*, 127 Mass. 242. *McDermott v. Hall*, 177 Mass. 224.

The claims in controversy not only are contingent, but the provisions of the leases relating thereto are of an executory character. As was said in *Allen v. Herrick*, *supra*, "The agreement is nevertheless executory in its character, to perform some act or pay money, not as a present existing debt or duty, but as a future liability or obligation to arise or grow out of the contract," and so was not provable in insolvency. See also *Roth v. Appel*, 181 Fed. Rep. 667; *In re Jorolemon-Oliver Co.* 213 Fed. Rep. 625.

The defendants contend that the time of the termination of the leases was important only as determining the time for payment, but in no way affected the lessee's obligation to make such payment. The difficulty with this contention is, as has been pointed out, that it was not certain that the leases ever would be terminated, or that the disputed items ever would be absolutely due or payable, and therefore it is plain that no provable debt was due when the assignment was executed. *Bowditch v. Raymond*, 146 Mass. 109, 114, 115. *Cotting v. Hooper, Lewis & Co. Inc.*

ante, 273. See also *Williams v. United States Fidelity & Guaranty Co.* 236 U. S. 549.

Most, if not all, of the cases cited by the defendants which have been decided by this court recognize the distinction between a debt absolutely due even if not payable, and a collateral and contingent liability, and it has been uniformly held that claims of the latter character are not provable in insolvency.

The case of *Lothrop v. Reed*, 13 Allen, 294, cited by the defendants, cannot be considered as an authority for their contention, as it decided only that a claim for unliquidated damages, resulting from the failure to fulfil a contract to sell and deliver goods, is provable in insolvency under our statutes. In that case there was no question but that there was a breach of contract, the only matter to be decided being the amount of the damages caused by the breach.

Because of the interpretation which we think should be put upon the leases heretofore referred to, the plaintiff is instructed that the disputed claims of the defendants were not provable in insolvency in view of our decisions, and consequently were not provable against the plaintiff as assignee.

The case is to stand for further hearing as to the amounts for which the defendants are entitled to have their claims allowed, respectively, in accordance with this opinion, unless the parties agree upon such amounts.

Ordered accordingly.

JAMES C. MCLELLAN vs. SAMUEL A. FULLER.

Middlesex. January 19, 1915. — March 11, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Attorney at Law, Liability for negligence. *Negligence*, Of attorney at law, Employer's liability. *Evidence*, Deposition. *Practice, Civil*, Exceptions, Deposition, Conduct of trial: judge's charge, Exceptions.

If, at the trial of an action against an attorney at law for damages alleged to have resulted from the defendant's negligence in conducting and trying an action for the enforcement of a claim of the plaintiff against his employer under the

employers' liability act, to prosecute which the plaintiff had employed the defendant, there is evidence that there was at the trial of that action evidence available to the attorney at law upon which a finding would have been warranted that, if the proper statutory notice had been given, the employer was liable, that the attorney was unable to prove the giving of the statutory notice either because he had failed to see that it was given or because, if it was given, he had failed to preserve and perpetuate evidence of its having been given, so that in the former action a verdict was ordered for the employer, a verdict cannot be ordered for the attorney in the present action and a verdict for the plaintiff is warranted.

A defendant is not entitled, by reason of an exception to a refusal of a request to have a verdict ordered in his favor, to have determined and adjudicated by this court the accuracy and legal effect of certain statements of fact made by the judge in his charge to the jury, alleged by the defendant to be inaccurate, especially where he failed to call the judge's attention to the alleged inaccuracies at the close of the charge.

A deposition of a witness in an action at law, taken upon oral interrogatories on the ground that the witness was about to go out of the Commonwealth not to return in time for the trial, if it otherwise is admissible as evidence, is not inadmissible merely by reason of the fact that the notice that it was to be taken, given by the justice of the peace before whom it was to be taken to the party objecting to its admission, misspelled that party's name, if the notice was delivered to the right person and he attended with his counsel at the taking of the deposition and participated therein; and it is immaterial that, upon discovering the misspelling of the name, a second notice was given which, if it had been the only notice, would have been too late to satisfy the requirements of R. L. c. 175, § 29.

An error, at the trial of an action against an attorney at law for alleged negligence in conducting the trial of an action by the plaintiff against the plaintiff's employer, in the exclusion of a deposition of a witness offered by the defendant is prejudicial if it appears that the testimony given by the witness in the deposition materially and substantially differs from that given by him at the trial of the previous action and, if believed, would show that in that action justice would have been done only if, irrespective of the way in which the attorney conducted the plaintiff's case, a verdict had been found for the plaintiff's employer, who was the defendant in that case.

TORT against an attorney at law for damages alleged to have resulted from negligence on his part in conducting and trying of an action by the plaintiff against the Moore Spinning Company under the employers' liability act. Writ dated February 17, 1908.

In the Superior Court the case was tried before *McLaughlin*, J. There was evidence that the plaintiff was injured on March 29, 1905, while in the employ of the Moore Spinning Company, that shortly thereafter he consulted the defendant and placed in his hands a claim against his employer for damages resulting from his injury, and that the defendant then informed him that

he had a good cause of action. The evidence available to the defendant as attorney for the plaintiff at the trial of his action against his employer is described in the opinion.

Just before the close of the plaintiff's evidence in the action against his employer, the present defendant in writing requested the attorney for the employer to produce the employer's statutory notice. The employer's attorney denied that the employer had received any notice. The present defendant then made the following statement to the presiding judge: "In regard to the notice here, we don't find any copy of any notice among our papers. We keep our notices separate, and I telephoned to the office for it and I have sent my girl over and she has telephoned that she hasn't found any yet. We have changed our office. Since moving my office the papers have got mixed up there. Some papers have got out of place and the notices are put in one place or supposed to be. The girl has telephoned that she hasn't found it yet in the envelope with the number on it and with the correspondence that ought to be there. She hasn't found it yet. I can make a motion for a new trial."

Thereupon the presiding judge ordered a verdict for the defendant, making the following statement to the jury: "In this class of cases, namely, cases under the employers' liability act, a notice is required to be given by the person injured to the employer, the defendant, within sixty days. Mr. Fuller states to me that he is unable to prove that notice. There is nothing that can be done except to direct you to return a verdict for the defendant. I am sorry to have the case end in that way, but there is nothing that can be done except to direct you as I am doing. You will accordingly return a verdict for the defendant."

At the trial of the present action, the defendant "testified that he was familiar with cases of this kind and knew that a notice was a condition precedent to recovery therein; and that he drew the declaration with care; that his brother, William J. Fuller, who had been associated with the him for several years before his death, had told the defendant that he went to North Chelmsford and served a notice on the Moore Spinning Company within the time required for serving such notices; but that his brother shortly before the trial of the case against the Moore Spinning Company had died suddenly and that the defendant was unable

to say whether the paper purporting to be the notice of the time, place and cause of the injury to the plaintiff was the notice served upon the Moore Spinning Company; that at the time of the trial of the case he was unable to identify the notice as the one served upon the defendant. The defendant further testified that on returning to his office on the day of the trial he talked with one Mr. Dewey, who was at that time in his office and through him expected to prove or identify the notice, and made a motion for a new trial but, on finding that it was impossible to identify the notice as the one served upon the defendant, the motion was not presented for hearing; that the defendant made a demand on the counsel for the Moore Spinning Company to produce all papers in his possession or in the possession of the insurance company who insured the Moore Spinning Company for the purpose of finding some evidence of the service of the notice on the Moore Spinning Company, but that there was no notice found in the papers.

The circumstances of the exclusion, subject to an exception by the defendant, of the deposition of the witness Bean are described in the opinion.

At the close of the evidence the defendant asked for the following rulings:

"1. There is not sufficient evidence to justify a verdict for the plaintiff.

"2. If the jury find that the plaintiff at the former trial could have proved that the statutory notice had been given except for the fact of the death of the brother of the attorney for the plaintiff, the jury must return a verdict for the defendant unless they find that the defendant in this case was negligent in not anticipating and providing against the death of his brother.

"3. If the jury find that it was a rule for the employees of the Moore Spinning Company that warning should be given to all employees at work on the machine before starting the machine and it was the custom to give such warning, and if they find that no warning was given by the Lavalley girl or, if given, was given in such a low tone that it was impossible for the plaintiff to have heard it, the plaintiff cannot recover.

"4. If the jury find that Ogley did give the order to start the machine up and it was the ordinary and usual custom for the girl when she did start the machine to call out in a tone loud enough

to be heard by every employee at work on the machine, and if she did not give such warning, the plaintiff cannot recover.

"5. Upon the evidence the jury must find that it was customary on starting the machine upon which the plaintiff was hurt, that the girl was to call out sufficiently loud as a warning for the operatives to hear, including the plaintiff."

"7. It was not the duty of the defendant to hunt up the plaintiff's witnesses or personally see to it that they were in court.

"8. It was the duty of the plaintiff or his father to have such witnesses in court as they knew or might have known were material in the proving of the plaintiff's case, or such witnesses as this defendant notified them to have present in court.

"9. If the plaintiff or his father knew that Harry Dolan was a material witness and did not have him present at the trial of the plaintiff's case against the Moore Spinning Company, the plaintiff is not entitled to his testimony at this trial and the jury is ordered to disregard his testimony.

"10. There is no evidence that the defendant in this case was any way at fault in failing to have the witness Dolan present at the trial of the case of the plaintiff against the Moore Spinning Company.

"11. There was evidence that the Lavalley girl knew that the machine was being changed over and if she knew that fact it was negligence on her part for which this defendant would not be responsible if she started the machine without giving proper and reasonable warning to the plaintiff of her intention so to do.

"12. The approximate cause of the plaintiff's injury was the starting of the machine without giving the usual and proper notice, and if it was the custom and method of starting the machine to first 'holler' loud enough to notify all working on the machine that it was to start and that there was nothing in Ogley's order (if he did order the girl to start the machine), that would naturally indicate that the machine was to be started without first calling out loud enough to notify all working on the machine, then there was no negligence on the part of Ogley for which this defendant would be responsible and your verdict must be for the defendant.

"13. If the Lavalley girl did receive orders from Ogley to start the machine and she understood that she was to start the machine

in the usual way, which was to call out before starting, and failed to call out loud enough so that the girls within a few feet of her could have heard her and there was no greater noise than usual at the time she called under like conditions at other times when she could be heard, it was her own fault, for which this defendant would not be responsible, and the jury must find for the defendant.

"14. If it was the usual and recognized way when starting the machine to call out 'look out' or other words to that effect so that those about the machine and working thereon could protect themselves when the machine was started up, and if the girl started the machine and failed to take the precautions usual, which was to call out in a loud voice, even though she had been instructed to start up the machine, and by reason of her failure to call out the McLellan boy was not notified so that he might protect himself, the defendant in this case would not be liable for her negligence and the verdict must be for the defendant."

The jury found for the plaintiff in the sum of \$2,500; and the defendant alleged exceptions.

R. Homans, for the defendant.

R. W. Gloag, for the plaintiff.

PIERCE, J. The jury rightly might have found that at the first trial there was available to the defendant, Fuller, as attorney for the plaintiff, the testimony of Delia Lavalle, of Addie Puffer, of Margaret Frances Bean and of the plaintiff; that their testimony, if believed, established that the plaintiff was in the employ of the Moore Spinning Company; that one Ogley was an overseer exercising the duties of a superintendent; that the duty of the plaintiff required him to obey the reasonable orders of the overseer; that on March 29, 1905, he was directed by that officer to change over the gears on one of the spinning frames; that for that purpose the machine was stopped; that on receiving the order he took the gears to the end of the machine nearest the wall to adjust them to the spinning frame; that while he was thus engaged, with mind intent on his work, the machine started up without warning, or without any person's giving actual notice to him that it was to start; that he then received injuries; that the overseer, while standing by the side of the machine and observing the situation of the plaintiff, had ordered it to be started up; that there was a

rule of the mill that before starting a machine at rest for repairs notice should be given to those working on it; that notice was not given by the person directed to start the machine; and that when the overseer gave the order for starting up he knew the rule was not obeyed by the starter and also knew that the plaintiff was in a situation of danger against which without warning he could not guard or protect himself and at the same time do the allotted work.

Under such conditions the jury would have been justified in finding that the plaintiff was in the exercise of due care and that the defendant company was negligent. *Davis v. New York, New Haven, & Hartford Railroad*, 159 Mass. 532. They might have found that the defendant Fuller was negligent in not putting before the jury at the first trial the testimony of the plaintiff; they also might have found him negligent in not giving the statutory notice, or, if they found that such notice was given, that he was negligent in not perpetuating testimony adequate to prove its service when proof thereof was required at the trial.

The rights of the defendant upon either hypothesis were carefully guarded in the judge's charge.

The defendant's first request, that "There is not sufficient evidence to justify a verdict for the plaintiff," for reasons stated could not have been given. The second request could not have been given because the question of the defendant's neglect to anticipate and provide against the death of his brother was not necessarily the only factor in the determination of the question of his due care. He might have been without fault in that regard and lacking in due care in other respects.

As the jury could have found the overseer superintendent negligent, the defence set up in the remaining requests is not open, — that a fellow servant was negligent, or that without the concurring fault of a fellow servant the accident would not have happened. *Myers v. Hudson Iron Co.* 150 Mass. 125, 137. It follows that the judge rightly refused to give them.

The defendant in his brief states that the judge in his charge made assertions of fact not justified by testimony or agreement of parties, and argues that he is entitled as matter of law, because of his general request that a verdict be directed for the defendant, to have the accuracy of the statements determined and their

legal effect adjudicated by this court, notwithstanding his omission to direct the attention of the trial judge specifically to his complaint or to allege exceptions. This is not the rule of law. *Horrigan v. Clarksburg*, 150 Mass. 218. And the facts do not create a right within the exceptions to the rule as indicated in such cases as *Brightman v. Eddy*, 97 Mass. 478, 481, *Slater v. Rawson*, 1 Met. 450, *Lyon v. Prouty*, 154 Mass. 488.

The defendant offered the deposition of Margaret Frances Bean, after having read to the jury the testimony given by this witness at the first trial. In that testimony, in connection with other statements not in conflict therewith, she said that at the moment of the accident she saw the overseer, Ogley, coming up the alley toward the place where the plaintiff was hurt. She made no statement as to who gave the order to start the machine, nor, except inferentially, as to Ogley's whereabouts at a time immediately preceding the accident. In her deposition she stated that she did not hear any one direct the machine to be started up, or call out that it was to be started; that she was beside the plaintiff and "in a position where she could have heard any one if they had hollered before starting up the machine."

She further deposed that she knew Ogley and did not hear him give any directions to any one to start the machine, and did not see him at the front of the machine.

This testimony contained in the deposition was of the greatest importance in that the jury, believing it, might accept it as a complete refutation of the charge that the overseer knowing the situation of the plaintiff ordered the machine to be started up without giving the customary warning.

A careful comparison of the testimony given at the trial with that set out in the proffered deposition shows the last to be more than merely corroborative of the first, and it should have been admitted in testimony unless rightly excluded on other grounds than that it was merely corroborative.

The facts in connection with the taking of this deposition show that on November 15, 1912, the defendant Fuller applied to Harold A. Varnum, justice of the peace, to take the deposition of Margaret Bean (Margaret Frances Bean) about to go out of the Commonwealth and not to return in time for the trial; that the justice issued a notice, in the form directed, to James C. McClellan;

that this notice was duly and seasonably served in hand; that after service the officer found that the name of the defendant James C. McLellan, had been spelled in the notice McClellan rather than McLellan; that he notified counsel of the fact and thereafter on the same day the same justice of the peace issued another notice which was directed to James C. McLellan; that this last notice was left, but not seasonably, at the last and usual place of abode of the defendant; that on the next day, at the time and place appointed, the place being the office of the justice, all parties attended and participated in the taking of the deposition; that before the deposition was taken the plaintiff stated that he objected "for want of sufficient notice, in that the statutory allowance of time did not intervene between the giving of the notice and the time stated in the notice for the taking of the deposition; because of its being heard on Saturday and because of its being begun after four o'clock on Saturday afternoon." By an agreement "all informalities in form or manner of taking same" were waived except as above set out.

The original service was entirely good; the notice was delivered in hand to the defendant, and more than the statutory time intervened between the time of giving the notice and the time stated in the notice for the taking of the deposition; the fact that the officer, from an over abundance of caution, procured a new notice to issue did not make invalid the original service. All parties attended the hearing and an inspection of the deposition shows that they were fully heard. The objection taken to the taking of the deposition went to the limit of technical defence and should not be favored.

The exception to the refusal to admit in evidence the deposition must be sustained; all the others are overruled.

So ordered.

JOHN I. FITZGERALD *vs.* MAYOR OF BOSTON & others.

Suffolk. March 17, 1915. — March 18, 1915.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Constitutional Law, Delegation of power by Legislature. *Municipal Corporations*. *Boston*. *Certiorari*.

The Legislature acted within its powers in requiring by St. 1914, c. 630, § 1, that the city council of Boston before January 1, 1915, should make a new division of the city into not less than twenty-four nor more than thirty-six wards with their boundaries so arranged that the wards should contain, as nearly as could be ascertained and as might be consistent with well defined limits to each ward, an equal number of voters.

The exercise by the city council of Boston of the power given them by the statute described above was administrative or political and was not judicial nor *quasi* judicial in character and therefore was not subject to review upon a writ of certiorari.

PETITION, filed in the Supreme Judicial Court on January 13, 1915, and afterwards amended, for a writ of certiorari to quash the action of the city council of Boston under St. 1914, c. 630, in making a new division of the city into wards.

St. 1914, c. 630, is as follows:

"Section 1. The city council of the city of Boston shall, before the first day of January in the year nineteen hundred and fifteen, make a new division of the territory of the city of Boston into not less than twenty-four nor more than thirty-six wards. The boundaries of the wards shall so be arranged that the wards shall contain, as nearly as can be ascertained and as may be consistent with well-defined limits to each ward, an equal number of voters. The city clerk shall forthwith give notice in writing to the secretary of the commonwealth of the number and designations of the wards so established.

"Section 2. For all elections held prior to the annual State primary and State election in the year nineteen hundred and sixteen, and for the assessment of taxes for the year nineteen hundred and fifteen, the wards, as existing previous to such re-division, shall continue, and for the said purposes the election officers shall be appointed and hold office, and voting lists shall be

prepared and all other things required by law shall be done as if no such re-division had been made. For all other purposes the re-division shall take effect on the first day of January in the year nineteen hundred and fifteen.

"Section 3. This act shall take effect upon its passage."

Section 4 of the charter of the city of Boston, St. 1909, c. 486, is as follows:

"Every appropriation, ordinance, order, resolution and vote of the city council, except votes relating to its own internal affairs, shall be presented to the mayor, who shall make or cause to be made a written record of the time and place of presentation, and it shall be in force if he approves the same within fifteen days after it shall have been presented to him, or if the same is not returned by him with his objections thereto in writing within said period of fifteen days. If within said period said appropriation, ordinance, order, resolution, or vote is returned by the mayor to the city council by filing the same with the city clerk with his objections thereto the same shall be void. If the same involves the expenditure of money, the mayor may approve some of the items in whole or in part and disapprove other of the items in whole or in part; and such items or parts of items as he approves shall be in force, and such items or parts of items as he disapproves shall be void."

The petitioner alleged, and the answers admitted, that the mayor, upon the order of the council being presented to him, had refused to act upon it, stating that the order did not require his approval and was not subject to his veto.

The petitioner also alleged that the boundaries of the wards were not so arranged "that the wards shall contain, as nearly as can be ascertained and as may be consistent with well defined limits to each ward, an equal number of voters."

The petition was heard by *De Courcy, J.*, who reported it for determination by the full court.

H. D. Crowley, (D. J. Kiley with him,) for the petitioner.

J. A. Sullivan, (G. A. Flynn with him,) for the mayor of Boston.

J. T. Hughes, for the city council of Boston.

RUGG, C. J. The General Court declared in 1914 that there should be a new division of the territory of the city of Boston into wards. It might have made the division itself. That was a

legislative matter within its constitutional powers. But it decided to impose that duty upon the members of the city council of the city of Boston. In substance it constituted them its committee and delegated to them its authority to this end. The delegation of this power was coupled with the positive command that the division must be completed before January 1, 1915, and that the number of wards should be not less than twenty-four nor more than thirty-six, and was made subject to the further somewhat general mandate that the boundaries were to be so arranged that the wards should contain, as nearly as could be ascertained and as might be consistent with well defined limits to each ward, an equal number of voters. The city clerk was required to report the decision of the city council to the Secretary of the Commonwealth forthwith. That decision was to become operative on January 1, 1915, without approval or confirmation by the Legislature or by any other body or tribunal. St. 1914, c. 630.

The members of the city council of Boston seasonably performed the duty delegated to them. The petitioner asks to have the division of the city into wards thus made declared void by a writ of certiorari.

It cannot be questioned that the Legislature might require the division of a city into wards to be done by persons not of its own membership. Any appropriate existing board of public officers might be selected for the purpose. Such has been the policy in this Commonwealth for many years, as shown by numerous statutes.

The essential character of the establishment of the municipal subdivisions of cities known as wards, when undertaken either by the Legislature itself or through deputies named by it, is political and not judicial. It is an administrative aspect of a legislative function which under our plan of government may be conferred upon subordinate officers. But the nature of the act is not changed by its being performed through a delegated instrumentality selected by the Legislature rather than by the Legislature itself.

The determination of the number of wards between the limits named in this statute and the division of the territory of the city into that number of wards, having regard to the natural configuration wrought by the harbor, inlets of the sea and rivers, and

other well defined boundaries, so as to contain within reasonable limits of variation an equal number of voters, is not a judicial act. It demands a careful study of local conditions and the exercise of sound judgment. But it is administrative or political, not judicial or *quasi* judicial in character. The discretion of the city council in performing such a duty is not subject to review by this court upon a writ of certiorari. That process is available only for the purpose of examining and correcting the errors of law manifest upon the record of some tribunal in its performance of judicature, and to restrain the excesses of jurisdiction of inferior courts or officers acting judicially. *Locke v. Lexington*, 122 Mass. 290. *Attorney General v. Mayor & Aldermen of Northampton*, 143 Mass. 589. *Devlin v. Dalton*, 171 Mass. 338. *Flanders v. Roberts*, 182 Mass. 524, 529.

The matters complained of in this petition do not fall under this classification. They relate to discretionary administrative details of political or legislative departments of government. See *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118; *Christlieb v. County of Hennepin*, 41 Minn. 142; *Moede v. County of Stearns*, 43 Minn. 312; *State v. Clough*, 64 Minn. 378. The case at bar plainly is distinguishable from *Kingman, petitioner*, 153 Mass. 566, and like decisions.

It follows that the petition must be dismissed because it seeks to have reviewed matters not justiciable upon a writ of certiorari.

It becomes unnecessary to determine whether the petitioner would have a right to bring a petition for such a writ if it were an appropriate remedy.

Petition dismissed.

RENTON M. PERLEY, trustee, & others vs. CITY OF CAMBRIDGE.

Middlesex. November 10, 1914. — March 31, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Trespass. Real Property. Municipal Corporations. Damages, For property taken or impaired under statutory authority.

If a city unlawfully enters upon land and constructs a water conduit beneath the surface, the conduit becomes a part of the real estate and the property of the owner of the land.

If, at the trial of a petition against a city for the assessment by a jury of damages sustained by the taking of an easement in land of the petitioner for the construction and maintenance of a water conduit, it appears that, previous to the taking, the city as a trespasser had entered upon the petitioner's land and had constructed the conduit, the petitioner is entitled to a ruling that the conduit thereby became his property, and, while the petitioner is not entitled to recover the cost nor the value to the respondent of the conduit, nor to have his damages enhanced by the certainty, if it is a certainty, that the city would have to make a taking of the conduit which thus had become the petitioner's property, the existence of the conduit upon the land may be treated as an element affecting the fair market value of the land so far as it would enter into the price which would be given for the petitioner's rights in the land by a prospective purchaser.

Where a city by right of eminent domain has taken an easement in private land for the purpose of the construction and maintenance of a water conduit, it has no right to prevent the owner of the land or his successors in title from making any use of the land for the laying of sewer, water or gas pipes, which does not interfere with the use by the city of the easement acquired by the taking.

Where a city by right of eminent domain takes an easement in land of a private person in another city for the construction and maintenance of a water conduit therein, the second city is not thereby precluded from laying out under the highway act a street over the land in which the easement has been acquired.

PETITION, filed on December 18, 1908, by the owners of Clark Street, an unwrought private way in Waltham, and of land adjacent thereto on both sides, for the assessment of damages resulting from the taking by the city of Cambridge under the power of eminent domain granted by St. 1884, c. 256, of an easement for the laying of a water main.

In the Superior Court the case was tried before *Wait, J.*

The record states, "The conduit was constructed in said Clark Street by the respondent as trespasser about one year before the taking of the land was made by the respondent."

The trial judge, subject to exceptions by the petitioners, ruled that the taking by the respondent did not give to it the right to prevent the laying of sewer, water and gas pipes in the land so long as they did not interfere with the use by the respondent of the easement taken by it, and he permitted the respondent to ask questions of its experts which assumed that to be the law.

The material evidence is described in the opinion. At the close of the evidence, the petitioners asked for the following instructions to the jury, which, subject to the exceptions by the petitioners, the judge refused to give:

"6. The pipe or conduit was placed by the defendant in the land of the petitioners in 1906 without right and as a trespasser and before the taking and the pipe or conduit then became part of the realty and the property of petitioners immediately on its being installed."

"8. Clark Street is not a public way, highway or other way within the meaning of St. 1884, c. 256, § 3, under which the taking was made by the respondent."

So much of the above mentioned section as is material is as follows: "Said city may also, for the purposes aforesaid, carry any pipe, drain or aqueduct over or under any river, watercourse, street, railroad, public way, highway or other way, in such manner as not unnecessarily to obstruct the same, and may enter upon and dig up such road, street or way for the purpose of laying down, maintaining or repairing any pipe, drain or aqueduct, and may do any other things necessary and proper in executing the purposes of this act."

At the request of the respondent and subject to exceptions by the petitioners, the judge ruled as follows:

"3. If the jury find that the natural and probable uses which the city of Cambridge shall make of the land taken will not prevent its use as a private way by the owners of the fee they will be warranted in finding that the petitioners have suffered no damage or at most, merely nominal damages."

"6. That the city of Waltham has the right under the high-

way act, notwithstanding the taking by the city of Cambridge, to lay out a highway over the land taken."

Regarding the conduit and the petitioners' sixth request, the judge instructed the jury as follows:

"There is a theoretical claim advanced here that the pipe belonged to Mr. Perley after it was put into his land wrongfully, and that if the city of Cambridge wants to take that it must pay for it. Now I am going to instruct you that you cannot take that into account in this case, that there is no right on the part of the petitioner to recover any added value of his land in consequence of the addition of that pipe to it by the city of Cambridge, even though the city of Cambridge added it at the time wrongfully. The claim in the eye of the law might be the same, would be in substance the same as if a city had taken land for a public high school we will say, suppose it had taken land and built its high school on the property and then found that its taking was invalid. There is an ordinary rule of law that if one man builds a house upon property of another person the house belongs to that other person. So it might be claimed that that public high school belonged to the owner of the land which had not been taken, and then when the city or town took it afterwards the owner might say, 'Well, now, you not only owe me for the land, but you owe me for that house which you put upon it and gave me.' Now I do not think there can be a recovery for such a thing as that, and that would be substantially the situation if there could be a recovery in this case for the pipe which was put into the land of the petitioner. You cannot take that into account here. What you have to get at, in measuring the damages of Mr. Perley and of the other people who have other interests in the land, is whether or not the market value of his property was diminished as a consequence of the acquisition of this right by the city of Cambridge. If it was, give him the amount of diminution of that market value. If it was not, do not give him anything; he has not been hurt if that is the situation."

The jury found for the respondent; and the petitioners alleged exceptions.

The case was submitted on briefs at the sitting of the court in November, 1914, and afterwards was submitted on briefs to all the justices.

M. H. Sullivan & D. J. Maloney, for the petitioners.

J. F. Ayloard, for the respondent.

RUGG, C. J. This is a petition for the assessment of damages occasioned by taking an easement for laying a water main by the respondent under the power of eminent domain conferred by St. 1884, c. 256. The petitioners were the owners of the fee of the land within which the easement was taken. It had been "dedicated by the owners of the fee as" a private way called Clark Street in the city of Waltham, but it was unbuilt and was passable for teams only for a portion of its length. It was part of a large tract of land which had been plotted into streets and building lots, some of which had been sold and built upon before the events here in question. It is stated in the bill of exceptions that "the respondent as trespasser" had entered upon Clark Street and constructed a concrete conduit for a water main about a year before the taking, which by description included the land wherein the main had been constructed. It is stated in the respondent's brief that for this trespass an action was brought by the present petitioners and damages recovered, but this must be disregarded for there is no reference to it in the exceptions. The respondent, as a municipality in general pursuing authority conferred by the State in supplying water, may be liable for a trespass committed by its servants outside its statutory power. *Mayo v. Springfield*, 136 Mass. 10. *Aldworth v. Lynn*, 153 Mass. 53.

The first question is whether the conduit, having been built within the land subsequently taken by the respondent, then became a part of the real estate and the property of the petitioners, so that they are entitled to have their damages assessed on that basis. It is familiar law that, ordinarily, when buildings or other structures are annexed to the realty in such way as to become incorporated with it by a trespasser, or without express or implied agreement to the contrary, they are a part of the land and belong to the owner who "has the right to that which is united to it by accession or adjunction." *Peirce v. Goddard*, 22 Pick. 559. There are many illustrations of the application of this principle in our cases. It was held in *Meriam v. Brown*, 128 Mass. 391, that where a railroad company had constructed its track over land without right, and without paying damages, and without

making a taking, and subsequently became bankrupt and abandoned the use of its roadbed, the rails had become a part of the land and could not be removed. It was said in *Hunt v. Bay State Iron Co.* 97 Mass. 279, that railroad rails upon private land became part of the realty in the absence of agreement to the contrary and enured to the benefit of the landowner. Buildings and other structures annexed to land by one rightfully in possession but without the consent of the owner, generally have been held to be a part of the realty. *Meagher v. Hayes*, 152 Mass. 228. Difficulties of this nature often arise between landlord and tenant and mortgagor and mortgagee. But the law is settled even under these circumstances that the owner of the land is the owner of the things incorporated with the realty unless there is some special agreement. *Trask v. Little*, 182 Mass. 8. *Mitchell v. Stetson*, 7 Cush. 435, 439. *Clary v. Owen*, 15 Gray, 522. *Southbridge Savings Bank v. Exeter Machine Works*, 127 Mass. 542. *Hook v. Bolton*, 199 Mass. 244. *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 377, 378. *Porter v. Pittsburg Bessemer Steel Co. Ltd.* 122 U. S. 267.

We are able to perceive no sound reason why this well established rule should not apply in instances where a municipality enters without shadow of right and as a pure trespasser upon the land of another and without consent of the owner affixes thereto structures which in their nature become part of the realty. A municipality enjoys no special immunity in this respect not accorded in general to others. It commonly possesses the power to exercise eminent domain and thus take the property of the landowner against his will. This factor affords it the less excuse for invading tortiously rights which it may extinguish in a legal manner.

This conclusion is supported by the decisions of courts of recognized authority. *St. Johnsville v. Smith*, 184 N. Y. 341. *Virginia & Southwestern Railway v. Nickels*, 82 S. E. Rep. (Va.) 693. Similar decisions in *United States v. Land in Monterey County*, 47 Cal. 515, and *Graham v. Connersville & New Castle Junction Railroad*, 36 Ind. 463, perhaps have been distinguished or overruled by the later cases of *Albion River Railroad v. Hesser*, 84 Cal. 435, 439, and *McClarren v. Jefferson School Township*, 169 Ind. 140, 144.

If the circumstances were that the city had been lawfully in possession of the land under a defective title and in good faith or by agreement or consent had attached permanent improvements to the soil, a different question would arise which need not be decided now. See *Searl v. School District No. 2 in Lake County*, 133 U. S. 553, 561; *Consolidated Turnpike Co. v. Norfolk & Ocean View Railway*, 228 U. S. 596, 602; and R. L. c. 179, §§ 17, 18.

Numerous authorities more or less inconsistent with the conclusion here reached are collected in 2 Lewis, Em. Dom. (3d ed.) § 759, and 6 Ann. Cas. 382, 384. But so far as they are out of harmony with the principles here stated we cannot see our way to follow them.

The sixth ruling requested by the petitioners should have been granted, and so much of the charge as was contrary to this principle was erroneous.

At the new trial the petitioners will be entitled to recover for the diminution in the fair market value of their land arising from the taking of the easement. In passing upon this question the jury may consider the fact that the conduit was constructed in the portion of the way in which the easement was taken. Of course the petitioners will not be entitled to recover the cost of the conduit nor the value of it to the respondent. The existence of the conduit upon the land may be treated as an element affecting the fair market value so far as it would enter into the price which would be given for the petitioners' rights in the land by a prospective purchaser. If it be found to be a certainty that the respondent would be bound to make the taking of this particular property, that circumstance is not an element of value. If the petitioners proceed to trial upon the theory that the diminution of the fair market value will not compensate them for the damage sustained by the taking and seek to have considered the real value for actual use upon the principles stated in *Beale v. Boston*, 166 Mass. 53, in this respect the rule is the same: they are not entitled to have their damages enhanced by the certainty, if it be found to be a reasonable certainty, that the city would make a taking of the property in question. *May v. Boston*, 158 Mass. 21. The familiar general rule of damages has been stated so fully in many cases that it need not be repeated. *Sargent v. Merrimac*, 196 Mass. 171.

Smith v. Commonwealth, 210 Mass. 259, and cases there cited. *McGovern v. New York*, 229 U. S. 363, 372. *United States v. Chandler-Dunbar Water Power Co.* 229 U. S. 53, 77. *Pastoral Finance Association, Ltd. v. The Minister*, [1914] A. C. 1083, 1088. *Cedar Rapids Manuf. & Power Co. v. Lacoste*, [1914] A. C. 569, 579. It may be added that if the evidence at the new trial should not differ materially from that disclosed upon the present record, the diminution in the fair market value will be the rule of damage to be followed.

The petitioners' eighth request was denied rightly as inapplicable to the issues being tried. The trial did not proceed on any theory that the respondent had laid its conduit in such a "way" as is described in St. 1884, c. 256, § 3, and hence was not liable to pay damages therefor. *Cheney v. Barker*, 198 Mass. 356, 362. *New York, New Haven, & Hartford Railroad v. Cohasset Water Co.* 216 Mass. 291. When the petitioners' right to maintain their petition depended on a taking made by the respondent on the basis that it was a private and not a public way, it would have tended only to confuse the jury to undertake to deal with law which would not aid in deciding the case. Submitting the case to the jury was a granting of all that was pertinent in that request.

The judge ruled correctly that the taking by the respondent for the purposes here disclosed did not give to the respondent the right to prevent the construction of a sewer over its conduit by any one having a right to build a sewer in the way. The respondent had constructed a cement conduit of most durable material and designed to last a long time. It was buried during its course through Clark Street on an average twenty-three feet below the surface, although for a short distance it was only two feet below the surface. The only easement acquired by the respondent was to use the land in connection with its water supply. It did not acquire the fee of the land. The structure being so constructed, it is plain that it could not prevent the owner of the fee or others empowered so to do from making reasonable structures above its conduit. *Clark v. Worcester*, 125 Mass. 226. *Newton v. Newton*, 188 Mass. 226. *Allen v. Boston*, 159 Mass. 324.

The third request of the respondent, in substance to the effect that the jury would be warranted in returning a verdict for the

respondent provided they found that the natural and probable uses to be made of the easement taken by the respondent would not prevent its use as a private way by the owners of the fee, was qualified by the instruction that they should consider also any interference with that use which might arise from the fact that the respondent had acquired the right to interfere with such use to some extent. It should be qualified further by the statement that the conduit laid by the city before the taking should be considered, provided it added anything to the market value of the fee of the land owned by the petitioners.

The instruction to the effect that the city of Waltham might lay out a street over the private way notwithstanding the taking of the respondent is not open to objection.

Exceptions sustained.



WALTER D. BURBANK vs. JOHN T. FARNHAM & another.

Suffolk. November 12, 1914. — November 30, 1914. March 31, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Municipal Court of the City of Boston, Discharge of appeal from Appellate Division. Supreme Judicial Court, Discharge by full court of record for amendment. Contract, Implied in law.

Where, on an appeal from a decision of the Appellate Division of the Municipal Court of the City of Boston dismissing a report of a ruling of a single judge of that court, it does not appear by the record whether all the material evidence upon which the findings of the single judge were based is stated or described, this court will grant a motion that the appeal be discharged to enable the party who requested the report to move for its correction by adding thereto the statement that it contains all the material evidence.

When such an appeal is discharged for such a correction of the record, the case goes back to the Appellate Division, who will remand it to the single judge for amendment of his report; and, if the report is amended by him by the addition of the required statement, it should be presented to the Appellate Division, who will make a decision upon the report in its amended form, from which an appeal should be taken to this court.

Statement by RUGG, C. J., of the practice of this court in regard to the discharge of exceptions, reports, reservations or appeals from the Superior Court or the Supreme Judicial Court for the purpose of correcting the record by amendment.

An action of contract for money had and received to the plaintiff's use cannot be maintained against one who received and collected a check drawn by the plaintiff payable to the order of a non-existent corporation and delivered by the plaintiff to a fraudulent person and who in good faith paid over to such fraudulent person the whole proceeds of the check.

RUGG, C. J. This case comes before us on an appeal from a decision of the Appellate Division of the Municipal Court of the City of Boston dismissing a report. During the oral argument before this court it was suggested that the record did not set out all the material evidence upon which the findings of the single judge of that court were based. Opposing counsel not agreeing upon this point, a motion was made that the appeal be discharged, not on its merits but in order that the report might be corrected in this regard so that it might state the fact whether it did contain all such evidence.

The motion should be granted. An appeal from the Municipal Court of the City of Boston in this respect stands the same as exceptions from the Superior Court. By St. 1912, c. 649, § 8, any party aggrieved by any ruling on a matter of law by a single judge of the Municipal Court of the City of Boston "may, as of right, have the ruling reported for determination by the Appellate Division." That court also is given authority to make rules to regulate the preparation and submission of reports and the allowance of those disallowed by a single judge. Pursuant to that authority a rule has been adopted which puts upon the party requesting a report the burden of preparing a draft to be submitted to the judge, who is required to "allow such report or such amended form thereof as may be necessary to conform to the facts, or disallow the same, in whole or in part." Rule 38. Provision also is made by Rule 41 for the establishment of reports by the Appellate Division which have been disallowed by the single judge.

The statute and rules do not prevent this court in proper cases from discharging a case pending here when there is reason to believe that through mistake, inadvertence or oversight the record does not present fairly the question of law of which review is sought. It sometimes, though rarely, happens that exceptions or a report or reservation from the Superior Court or the Supreme Judicial Court are discharged for the purpose of correcting the record in order that justice may be done. *Tighe v. Maryland*

Casualty Co. 216 Mass. 459. In strictness the exceptions, or in an equity case the appeal, are no longer pending in the Superior Court after entry in this court and there is nothing left in that court upon which a judge can act, even for the correction of errors. *Commonwealth v. Suffolk Trust Co.* 161 Mass. 550. *Robinson v. Brown*, 182 Mass. 266. The exceptions or appeal must get back into the trial court before anything more can be done there. It has been the uniform practice of this court for many years, when it seems likely that justice requires it, on motion to discharge exceptions, report, reservation or appeal, in order that corrections may be made in the record by the court from which the case comes here. In such instances the names of the cases have been continued in this court for re-entry of the proper papers without the payment of another entry fee. This is the accurate and correct practice. Another course, however, sometimes has been taken in England. Both parties by consent have gone before the trial judge and obtained from him a certificate to the effect that there is error in the record transmitted to the appellate court, setting forth its nature and making the correction, and such certificate agreed to by the parties has been presented to the appellate court and treated as a part of the record. This course was followed in *Culley v. Doe*, 11 Ad. & El. 1008, 1013. It was sanctioned by citation in *Perry v. Breed*, 117 Mass. 155, 164. See also *McCarren v. McNulty*, 7 Gray, 139. But of right the trial court judicially can consider the subject of mistake or amendment only after authority obtained from this court. That authority must be given, using terms accurately, by remanding the record to the trial court for correction or for hearing upon correction. The case thus temporarily is sent back from this court, although the copies and other papers, if any, not connected with that part of the record in which correction or amendment is sought, remain here. Hence, the case is not here in any substantial sense, although it has not been decided on its merits. This is an amplified statement of the effect of *Perry v. Breed*, 117 Mass. 155.

On principle like procedure should be followed as to cases from the Municipal Court of the City of Boston. This method of procedure must be modified slightly to conform to the practice established by statute for appeals from the Appellate Division. Hence, when the appeal is discharged it must go back to that

tribunal. As the record alleged not to be correct was not made by that tribunal, but by the single judge, it should be remanded to him by the Appellate Division for amendment of the report by stating whether the report, which was made by him, contained all the material evidence. Then the report in usual course should come to the Appellate Division, which should make a decision upon the report in its amended form and its decision should be brought by appeal to this court. In cases where the form of the report is established by the Appellate Division, after having been disallowed by the trial judge, there is no occasion to send it to him, for then the Appellate Division is qualified to pass on the question of mistake or omission. This is a simple and direct method. It need involve no delay if the omission in the record was only one of form and not of substance. It conforms to all the requirements of St. 1912, c. 649. If in any instance a change of substance is made in the report, a rehearing on the merits and not a formal re-entry of its earlier decision would be required.

Let the appeal be discharged, not on its merits but to enable the defendants to move for correction of the report by adding thereto the statement that it contains all the material evidence.

So ordered.

IN PURSUANCE OF the order contained in the rescript accompanying the foregoing decision, the Appellate Division of the Municipal Court of the City of Boston remanded the report in the action to the trial judge, and upon a motion of the defendants that judge amended the report by adding thereto the words, "January 1, 1915. The foregoing report contains all the material evidence." The judge then returned the report to the Appellate Division, who made an order that the report as amended be dismissed, and the defendants appealed from the order.

Thereafter this court considered the case upon its merits. It was an action of contract brought on November 28, 1913, against two defendants, Farnham and Nelson, as copartners doing business under the name of Farnham and Nelson Company, for the sum of \$450 alleged to have been received by the defendants to the plaintiff's use. There was a declaration in set-off on a counterclaim of the defendants for \$46.57. The evidence before the single

judge of the Municipal Court is stated in substance in the opinion on the merits. The first ruling requested by the defendants and refused by the judge, which is referred to in the opinion, was that upon all the evidence the plaintiff was not entitled to recover. The defendants also asked the judge to rule that, if the Maine Products Company, mentioned in the opinion, was a *de facto* corporation and the defendant Farnham was its *de facto* treasurer, the defendants were not liable to the plaintiff. The judge found that the Maine Products Company "was not a *de facto* corporation as to the plaintiff's claim," and therefore refused to make the ruling as not being applicable. The judge found for the plaintiff in the sum of \$407.65 and disallowed the declaration in set-off.

Lee M. Friedman, for the defendants.

J. N. Johnson, for the plaintiff.

DE COURCY, J. One Dennis induced the defendants Farnham and Nelson individually to join with him in forming a company to be known as the Maine Products Company. Dennis employed the Corporation Security Company to incorporate the Products Company under the laws of Maine. An organization meeting was held in Biddeford, Maine; and on December 18, 1912, at a meeting held in Boston, Dennis was elected president, the defendant Farnham treasurer, and the defendant Nelson secretary. By a vote of the directors Dennis was given full power to sell stock of the Maine Products Company, and to indorse checks, which later were to be turned over to the treasurer. For some unexplained reason the company did not in fact receive a charter from the State of Maine.

The plaintiff entered into negotiations with Dennis in relation to the new company, and as a result gave him (Dennis) a check for \$450, dated April 10, 1913, and payable to the order of the Maine Products Company; and he received a certificate for five thousand shares of the capital stock of the Maine Products Company. All the plaintiff's dealings and arrangements were with Dennis, who was the only person he knew in connection with the company, until he made a demand on the defendants in August.

The plaintiff's check was brought by Dennis to the office of Farnham and Nelson, and was cashed by them at his request, — \$200 being paid to Dennis at the time and the balance later, on his

order. The stock certificate given to the plaintiff was one of a number that Farnham had given to Dennis, signed in blank. It appeared that the defendants had no experience with corporation matters, that they believed a charter had been issued and the corporation legally organized, and that they paid out more than was received from this, the only sale of stock.

The plaintiff's grievance is that he contracted to buy stock in a Maine corporation, and that what he received was not stock in a corporation. Assuming in his favor, without so deciding, that the Maine Products Company was not a *de facto* corporation, and that he is not estopped to impeach the legality of its organization, it is to be noted that he is not seeking the repayment of his money from Dennis, who is alleged to have practiced the fraud upon him. This action is brought against Farnham and Nelson as copartners. It is settled that the plaintiff cannot rescind the contract of purchase and recover against the others associated with the attempted incorporation on the ground that the members of the invalid organization became partners. *Perry v. Hale*, 143 Mass. 540. As to the firm of Farnham and Nelson, the only connection they had with the sale to the plaintiff was through his check for \$450. It is stated in his brief that "the plaintiff's case is an action for money had and received to his use and proceeds upon the theory of unjust enrichment." By this phrase presumably is meant that the defendants have retained for their own use the money of the plaintiff, contrary to law and justice. See Ames, *Lectures on Legal History*, 162. The evidence however does not support such a claim. It appears that the defendants were not "enriched" by the plaintiff's purchase money, but acted merely as the conduit of it. They deposited the check in their bank account apparently because the Maine Products Company had no bank account of its own. They paid out the entire amount of the proceeds to, or to the order of, Dennis, from whom they had received the check. Even assuming that they could have been held liable to the plaintiff while the money was in their possession, they had none of the proceeds in their hands in August, when the plaintiff undertook to rescind the sale as against the other party to it, whether that party was Dennis personally or a *de facto* corporation. Acting in good faith the defendants had paid over the entire sum to the order of Dennis, while the right to avail them-

selves of the plaintiff's check remained unquestioned; the last of the money, \$46.57, having been paid to the plaintiff himself on May 7, 1913. See *Cole v. Bates*, 186 Mass. 584; *Brown v. Pierce*, 97 Mass. 46; *White v. Dodge*, 187 Mass. 449. It should be added that the question of the individual liability of Farnham for signing the stock certificate in blank is not involved in the case presented, and has not been considered.

We are of opinion that the first ruling requested of the defendants should have been made. The order dismissing the report must be reversed; and judgment for the defendants under St. 1913, c. 716, is to be entered by the Municipal Court. *Loanes v. Gast*, 216 Mass. 197.

So ordered.

MARY E. TORREY vs. CHAUNCEY D. PARKER & others, trustees,
& another.

Suffolk. November 16, 1914. — March 31, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Landlord and Tenant, Construction of lease, Covenants. *Party Wall*. *Estoppel*. *Agency*, Existence of relation. *Equity Pleading and Practice*, Cross bill, Demurrer. *Waiver*.

By a lease to a banking corporation of a two story building on Devonshire Street in Boston which occupies substantially all of the land of the lessor, the lease purporting to convey "the entire building" and the "land under the same" and providing that "the premises" shall "be used only as a banking house," that they shall be kept by the lessee "in good repair, order and condition, including outside repairs to the sidewalk," that the lessee shall not permit "any placard or sign to be placed upon said building except such and in such place and manner as shall have been first approved in writing by the lessor," and that the lessee shall pay "all taxes and assessments on said premises," the lease containing no reservation to the lessor of a right to enter upon the demised premises to make necessary repairs upon that portion of a party wall forming part of the building and of a building on an adjacent lot which is six stories in height, all the lessor's interest in the party wall is conveyed to the lessee for the term of the lease, and the lessor has no right to compel either the lessee or the owner of the adjoining building to close openings for windows placed with the lessee's permission in the wall above the line of the roof of the bank building.

And where under the circumstances above stated it appears that, at the time when the owner of the adjoining building placed the openings in the wall, he repaired the wall after the lessor had refused to do so, and that after the lessor had refused

to furnish additional ventilating facilities at the request of the lessee, the owner of the adjoining building placed a ventilating flue in the wall as he was rebuilding it, that the lessee "made no inquiry as to the terms or conditions on which these things were being done, being indifferent as to how" they were "being done and being simply satisfied that" it was getting the desired ventilating, it cannot be said that the lessee is estopped to deny the lessor's right of control over that part of the party wall above the roof line of the banking building; nor is there any basis for a contention upon such facts that there was a relation of principal and agent between the lessee and lessor.

Under such circumstances the giving by the lessee to the owner of the adjoining building of permission to use the party wall above the roof line of the banking building for the purpose of placing the windows there for the adjoining building is not a violation of the promise of the lessee that the demised premises shall be used "only as a banking house," such use of the wall being incidental and subsidiary to and not inconsistent with the exclusive use of the premises for a banking house.

In a suit in equity by the owner of land with a two story building thereon and with a party wall standing upon it and adjoining land extending several stories above that building, against the lessee of the two story building and the owner of the adjoining building to enforce an alleged right to have openings, which had been made in the wall for windows, closed, it is a proper subject for a cross bill by the owner of the adjoining building against the plaintiff and one to whom he had conveyed his right in the party wall to seek to compel the removal of shutters placed by them over the openings in the wall.

By proceeding with a hearing before a master of a suit in equity and a cross suit, the defendant in the cross suit waives a demurrer which was included in his answer to the cross bill.

RUGG, C. J. This is a bill in equity * whereby the plaintiff, as the owner of an estate on Devonshire Street, seeks to compel certain defendants, who may be called the Parker Trustees and who are the owners of an adjoining estate on Devonshire Street on the south known as the Parker Building, to close certain openings in a party wall between their respective estates, and to enjoin the Cosmopolitan Trust Company from interfering with such closing. The plaintiff became the owner of this estate, subject to a lease for a term of ten years to the Cosmopolitan Trust Company of "the entire building, including the basement, and land under the same, now numbered 74 and 76 Devonshire Street," the lessee covenanting that "the premises" should "be used only as a

* This bill, filed in the Supreme Judicial Court on April 27, 1914, and a cross bill, hereinafter described, were referred to Henry E. Warner, Esquire, as master. Exceptions to his report were overruled and the suits were reserved by *Hammond, J.*, upon the report and the pleading for determination by the full court.

banking house." The Trust Company building covers the plaintiff's entire lot between its northerly and southerly boundaries. It is not above two stories in height, except that the southerly wall between the estate of the plaintiff and that of the Parker Building is a party wall extending four stories above the Trust Company building to a total height of six stories, six inches of the wall being upon the Torrey land. In 1913 this wall was rebuilt for fourteen feet back from Devonshire Street above the top of the Trust Company building, by the Parker Trustees as a part of the reconstruction of the building on their lot. See *Fleming v. Cohen*, 186 Mass. 323. With the consent of and in consequence of a license from the plaintiff, certain windows were opened in this reconstructed wall. A vital question is, whether the lease to the Trust Company includes this party wall so far as on the plaintiff's land.

The important words used in the lease are comprehensive. "The entire building" as a descriptive phrase indicates a purpose to include all artificial constructions upon the land. The further words which demise the "land under the same," when read with the preceding words, manifest a design to transfer to the tenant all that the lessor owned in that connection. This building is on a chief business street in the centre of a great city. From other parts of the record it appears inferentially, if not expressly, that the land of the plaintiff is substantially all covered by the building. The lease as a whole discloses an intent to divest the owner of all control and responsibility to the tenant or others respecting the estate and to repose the same in the tenant. By the narrowest interpretation, the party wall, so far as it forms a part of the edifice covered by the roof of the Trust Company building, must be treated as a part of the demised premises. It seems more reasonable to assume that the parties intended to include the wall above the roof line in the lease rather than to leave this in the control of the lessor with the obligations and burdens connected with such proprietorship and management. The lessee covenanted to keep "the premises in good repair, order and condition, including outside repairs to the sidewalk." This implies an obligation, apparently coextensive with ownership of the fee of the lessor. It is natural so to construe it, for it places the obligation to repair the wall upon the person in possession of that part of the estate which

must be used in repairing that part of the wall exposed above the roof of the two stories. There is no reservation to the lessor of the right to enter upon the demised premises to make necessary repairs upon that part of the wall. While such a wall might not usually need much repair, yet it is quite possible that lightning, frost or the operation of other natural forces, or some accident other than fire (for which provision is made in the lease) might so affect it as to require attention to prevent further deterioration or injury to the demised banking rooms. The provision of the lease, that the lessee shall not permit "any placard or sign to be placed upon said building except such and in such place and manner as shall have been first approved in writing by the lessor," has a more reasonable scope and seems to be more in harmony with the presumed intention of the parties if it be construed as including the party wall. The kind of sign to be placed upon the front of a two story bank building, with higher buildings on each side, has less interest to the landowner than the kind of signs and placards to be placed upon adjacent loftier and overlooking walls has to the tenant of such a building. The lessee by a covenant in the lease is required to pay "all taxes and assessments on said premises." It would be an unusual arrangement to divide a party wall horizontally for purposes of taxation. It is more natural to expect that the lessee was to pay the entire tax. Interpreting the lease as a whole, in the light of the words employed and the subject matter to which it relates, we are of opinion that it includes the party wall above as well as below the roof of the banking building. See in this connection *Lowell v. Strahan*, 145 Mass. 1.

The plaintiff cannot compel the Trust Company to restore the wall to a solid condition, for she has undertaken to cause by her license the openings to be made in a part of the premises covered by its lease, without conferring with her lessee or securing its agreement to any matter in connection with it. She cannot require the Parker Trustees to do it against the protest of the Trust Company, because she has no right in this respect in the wall during the term of the lease.

It follows that the license of the plaintiff to the Parker Trustees to make openings in the party wall was ineffective so far as concerns the rights of the Cosmopolitan Trust Company under its lease. It is not estopped now from asserting its rights as lessee.

It is contended, however, that because it interposed no objection to the arrangement between the plaintiff and the Parker Trustees, it cannot now make any claim to the wall. It does not appear that the Trust Company knew about the negotiations or the final agreement between the plaintiff and the Parker Trustees. The finding of the master upon this point is that, at the time the matter of the rebuilding of the wall came up, the Trust Company requested the agent of the plaintiff to have the ventilation of its premises improved by means of a flue up the side of the wall. This request was refused. The Parker Trustees, however, knowing of this desire on the part of the Trust Company, built a ventilating flue in the wall for the premises of the Trust Company. That company was aware that the wall was being rebuilt, that the flue was being constructed, and that windows were being opened in the new wall, but "it made no inquiry as to the terms or conditions on which these things were being done, being indifferent as to how it was being done and being simply satisfied that" it was getting the desired ventilation. These facts fall far short of working an estoppel in favor of the plaintiff against that company from now asserting its rights under the lease to prevent further mechanical work upon the wall. She has not been induced by its speech, silence or conduct to change her situation to her harm. *Huntress v. Hanley*, 195 Mass. 236, 241. *Bragg v. Boston & Worcester Railroad*, 9 Allen, 54. *Bronson v. Chappell*, 12 Wall. 681, and like cases relied on by the plaintiff, are plainly distinguishable. Nor do these findings show as matter of law that the relation of principal and agent between the Trust Company and the plaintiff existed as to the license from her to the Parker Trustees. Almost every fundamental necessary to the establishment of that relationship is lacking.

The permission by the Trust Company to the Parker Trustees for the openings to remain in the walls is not a violation of its covenant that "the premises shall be used only as a banking house." It is to be noted that the making of the openings for the windows was not authorized by the Trust Company, nor is it seeking to have them closed. Different questions might be presented in that event. In reliance upon a license of the plaintiff as lessor and owner, these openings have been made by a third person. The Trust Company now does not seek to change that

physical situation. It simply insists that the wall remain in the condition in which it now is. It has agreed with the Parker Trustees that it may so remain, so far as it has power to grant such permission.

This is a use of the wall incidental and subsidiary to and not inconsistent with the exclusive use of the premises for a banking house. It does not alter or affect the regnant character of the occupation for banking purposes. *Mount Hermon Boys' School v. Gill*, 145 Mass. 139. *Emerson v. Milton Academy*, 185 Mass. 414. *Albani v. Evening Traveler Co.*, ante, 20. *Stuart v. Diplock*, 43 Ch. D. 343.

The Parker Trustees by their acceptance of the license from the plaintiff are in no wise precluded from now availing themselves of the license from the Trust Company. They do not stand toward her in the relation of tenant to a landlord. They were merely her licensees.

The Parker Trustees brought a cross bill against the plaintiff, Torrey, and one J. Murray Howe, who was not a party to the original bill, setting forth an alleged lease from Torrey to Howe of the part of the party wall owned by her in which the windows had been opened, and the placing by him of shutters and other obstructions against these openings, and praying that they be removed. This cross bill relates to the same subject as the original bill. The matters and things alleged in it grow out of and depend upon the rights established by the lease to the Trust Company. It is convenient and expeditious to consider the whole matter in one proceeding. Although a demurrer to the cross bill was filed as a part of the answer to it, the record shows that the original and cross bill were referred to a master who fully heard the parties and filed a report upon all issues raised. The defendants in the cross bill by proceeding to a hearing on the merits must be held to have waived the parts of the answer setting up that the plaintiffs had a plain and adequate remedy at law and that the cross bill could not be maintained. *Driscoll v. Smith*, 184 Mass. 221. *Bauer v. International Waste Co.* 201 Mass. 197. Indeed, they have not argued the point in this court.

It is apparent from what has been said that Howe has no right to maintain the shutters and should remove them and other structures erected by him upon or adjacent to the wall covered by

the lease to the Trust Company. It is of no consequence in this connection that he acted without malice. His conduct in this respect violates the rights of the Parker Trustees obtained by them from the Trust Company, and he must remove the obstructions.

The prayer of the cross bill that the license from the plaintiff to the Parker Trustees be declared void is denied. It is conceivable that circumstances might arise wherein it may have value even if it is not now of practical worth. It was not void. It simply could not affect adversely the rights of the Trust Company.

The plaintiff's bill is to be dismissed with costs. The cross bill against Howe is sustained and an injunction is to be granted to remove the shutters.

So ordered.

J. T. Wheelwright, for the plaintiff.

E. D. Fullerton, (*R. L. Robbins* with him,) for the trustees.

Lee M. Friedman, for the Cosmopolitan Trust Company.

R. Spring, for *J. Murray Howe*.



CHARLES J. SPONATSKI'S (dependent's) CASE.

Suffolk. January 13, 1915. — March 31, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Workmen's Compensation Act. Evidence, Presumptions and burden of proof. Proximate Cause.

On an appeal to this court under the provisions of the workmen's compensation act, where the substance of the evidence is reported, the question is open whether a finding of the Industrial Accident Board which was confirmed by the decree of the Superior Court was warranted by the evidence.

Where under the workmen's compensation act a claim for compensation is made by the dependent widow of an employee whose death is alleged to have resulted from an injury arising out of and in the course of his employment, the burden of proving the essential facts necessary to warrant an award of compensation rests upon the dependent in the same way that the burden of proof rests upon the plaintiff in any proceeding at law.

Upon a claim under the workmen's compensation act of the dependent widow of an employee whose death is alleged to have resulted from an injury arising out of and in the course of his employment, if it appears that the injury to the work-

man was followed by his death, it is immaterial whether or not the death was the reasonable and likely consequence of the injury. The only question is whether the death was the result of the injury within the meaning of St. 1911, c. 751, Part II, § 6, which provides for compensation to be paid to dependents "if death results from the injury."

Upon a claim under the workmen's compensation act of the dependent widow of an employee whose death was alleged to have resulted from an injury arising out of and in the course of his employment, it appeared that the deceased employee in the course of his employment had been struck in the eye by a splash of molten lead which caused the loss of his eye, mental derangement and insane hallucinations, and that while he was at a hospital under treatment he leaped from a window and was killed by the fall. The circumstances of his leap from the window indicated ungovernable lunacy rather than the volition of even a diseased mind. *Held*, that the rule of causation established by *Daniels v. New York, New Haven, & Hartford Railroad*, 183 Mass. 393, applies to cases under the workmen's compensation act, and that, applying it here, there was evidence warranting a finding by the Industrial Accident Board that the death of the employee resulted from the injury to his eye which arose out of and in the course of his employment.

Rugg, C. J. The deceased employee received an injury in the course of and arising out of his employment through a splash of molten lead into his eye on September 17, 1913. He was treated at a hospital until October 13, 1913, when, as was found by the Industrial Accident Board, "while insane, as a result of his injury, he threw himself from a window and was fatally injured." The board found further that "this insanity was brought about and resulted from the injury," and that, while the evidence was very close upon that point, the death "did result from 'an uncontrollable impulse and without conscious volition to produce death,'" under *Daniels v. New York, New Haven, & Hartford Railroad*, 183 Mass. 393, 400. The arbitration committee, whose findings were affirmed and adopted by the Industrial Accident Board, put it this way: "We find and decide as a fact that the accident injured the eyesight of the deceased, caused the loss of his eye, caused a nervous and mental derangement, caused insane hallucinations and caused him, while mentally deranged, in a state of insanity and under the influence of hallucination, by an irresistible impulse, to commit suicide, and that the accident was the sole, direct and proximate cause of the suicide."

The insurer contends that these findings are not warranted by the evidence. That question is open to it, for the substance of the evidence is reported. *Pigeon's Case*, 216 Mass. 51.

The burden of proving the essential facts necessary to estab-

lish a case warranting the payment of compensation rests upon the dependent in a case arising under the workmen's compensation act as much as it does upon a plaintiff in any proceeding at law. The dependent must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right. They can no more prevail if factors necessary to support the claim are left to surmise, conjecture, guess or speculation, than can a plaintiff in the ordinary action in tort or contract. A sure foundation must be laid by a preponderance of evidence in support of the claim, before the dependents can succeed. The elements that need to be proved are quite different from those in the ordinary action at law or suit in equity, but, so far as these elements are essential, they must be proved by the same degree of probative evidence. Of course this does not mean, as was said by Lord Loreburn in *Marshall v. Owners of Steamship Wild Rose*, [1910] A. C. 486, "that he must demonstrate his case. It only means that if there is no evidence in his favor upon which a reasonable man can act he will fail." If the evidence, though slight, is yet sufficient to make a reasonable man conclude in his favor on the vital points, then his case is proved. But the rational mind must not be left in such uncertainty that these essential elements are not removed from the realm of fancy. *Plumb v. Cobden Flour Mills Co. Ltd.* [1914] A. C. 62. *Barnabas v. Bersham Colliery Co.* 4 B. W. C. C. 119. *Fletcher v. Owners of Ship Duchess*, [1911] A. C. 671. See also *Childs v. American Express Co.* 197 Mass. 337; *Bigwood v. Boston & Northern Street Railway*, 209 Mass. 345. The board adopted rulings, and thereby instructed itself as matter of law, in accordance with the substance of these propositions as requested by the insurer, and no error is shown in this regard.

There was evidence tending to show that, although for a time after the injury the deceased was in his normal temperament which was hopeful and joyous, he then became silent and moody, and was depressed, and suffered from certain marked hallucinations. He did not appear affectionate as he always theretofore had been toward his wife and young children. There were two witnesses of the event which directly produced his death. One gave the following description: "That morning I was making my first visit to the ward. . . . Mr. Sponatski was sitting on the

window sill, leaning against the frame and his feet were up against the other side. The window was open and he was looking out and I spoke to him and asked him to come down. He turned around and gave me a kind of wild look. I thought he was getting off the window sill. He let one foot down and raised up on the other knee and at that he got up on the window sill and leaped right out. . . . It happened very quick. . . . He had a wild look. He looked as if he was frightened. . . . He appeared as if he had just woke up out of a deep thought. Kind of wild." The other said that after he was spoken to "he hesitated a few minutes; he looked as blank; he was undecided what to do; [he had] a very wild glassy look. He didn't seem to act as though he heard at all — just looked blank. . . . He had a vacant stare as though he didn't see you — as though he was picturing things he didn't see; things in his imagination. He didn't pay a bit of attention to us at all — just as if we were not there." The medical examiner who made a post mortem examination of the brain testified that the deceased "did not have any form of insanity, except possibly general paresis, but for any other form, I could not express an opinion." An alienist of experience testified that probably there was developed from the accident a "mental disturbance" accompanied by "delusions and hallucinations" and as a result committed suicide. After his death a letter, which the board decided was written by him, was found under his pillow, as follows: "my wife folks are not to blame for anything my wife was a pur woman when I married her she be is pure to this day it is all my own fault (signed) Martin Sponatski." Aside from this there was no evidence tending to show that he had contemplated suicide or that the jumping from the window was the exercise of even a "moderately intelligent power of choice." *Daniels v. New York, New Haven, & Hartford Railroad*, 183 Mass. 393, 400.

The letter does not seem to us necessarily indicative of a suicidal purpose. It was not signed by the name of the deceased, which was Charles J. Sponatski. It apparently was wholly the product of a disordered intellect. It is as consistent with some other phantom of an unbalanced imagination as it is with a volition to end his life. The circumstances of the leap from the window as narrated by all the eyewitnesses, point rather to ungovernable lunacy than to the volition even of a diseased mind. The find-

ing in this respect, although hanging on a rather slender thread of evidence, is not unsupported. Therefore it must stand.

This decision rests upon the rule established in *Daniels v. New York, New Haven, & Hartford Railroad*, *supra*. That rule applies to cases arising under the workmen's compensation act. It is that where there follows as the direct result of a physical injury an insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy "without conscious volition to produce death, having knowledge of the physical nature and consequences of the act," then there is a direct and unbroken causal connection between the physical injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary wilful choice determined by a moderately intelligent mental power which knows the purpose and the physical effect of the suicidal act even though choice is dominated and ruled by a disordered mind, then there is a new and independent agency which breaks the chain of causation arising from the injury. See *McDonald v. Snelling*, 14 Allen, 290.

The Industrial Accident Board was in error in adopting a ruling and thereby instructing itself "that the rule laid down in the Daniels case is not the rule to be followed under the workmen's compensation act. In other words, the question is not whether the consequence is a reasonable and probable one, but whether the consequence resulted from the injury." No question of negligence in its common law sense, or of reasonable and probable consequence was involved or discussed in the Daniels case. That was an action brought under Pub. Sts. c. 112, § 213, now St. 1906, c. 463, Part II, § 245, to recover damages for conscious suffering and death caused by failure on the part of the defendant railroad to give the statutory signals of warning where a railroad crossed a highway at grade. Under that statute the liability of the railroad is made out when the fact of failure to give the statutory signals is established (unless a special defence prevails).

The inquiry as to reasonable and probable consequences did not arise in the Daniels case; but it does arise in actions at common law and under some other statutes in order to decide whether there has been negligence. Even then the question is not whether "the consequence is a reasonable and probable one," but whether harm to some one of the same general kind as that sustained by

the plaintiff was a reasonable and probable result of the act complained of, as bearing upon the ultimate question whether there was negligence on the part of the defendant. Negligence may be found even though the particular result of the act may not have been susceptible of being foreseen. See *Ogden v. Aspinwall*, ante, 100, and cases there collected; *Larson v. Boston Elevated Railway*, 212 Mass. 262; *Wiemert v. Boston Elevated Railway*, 216 Mass. 598; *Brightman's Case*, 220 Mass. 17.

Other instances where liability is not predicated upon negligence, and where therefore there is no occasion to consider in any aspect natural and probable consequences, are actions to recover damages arising from fires set by locomotive engines, *Bowen v. Boston & Albany Railroad*, 179 Mass. 524; from a vicious animal knowingly kept, *Marble v. Ross*, 124 Mass. 44; from dogs, *Pressey v. Wirth*, 3 Allen, 191; or from the breaking away of impounded waters, *Rylands v. Fletcher*, L. R. 3 H. L. 330. So far as concerns conduct of defendants, liability follows absolutely in such cases when the particular decisive fact is shown to exist.

The obligation to pay compensation under the workmen's compensation act equally is absolute when the fact is established that the injury has arisen "out of and in the course of" the employment. Part II, § 1. It is of no significance whether the precise physical harm was the natural and probable or the abnormal and inconceivable consequence of the employment. The single inquiry is whether in truth it did arise out of and in the course of that employment. If death ensues, it is immaterial whether that was the reasonable and likely consequence or not; the only question is whether in fact death "results from the injury." Part II, § 6. When that is established as the cause, then the right to compensation is made out. If the connection between the injury as the cause and the death as the effect is proven, then the dependents are entitled to recover even though such a result before that time may never have been heard of and might have seemed impossible. The inquiry relates solely to the chain of causation between the injury and the death. *Dunham v. Clare*, [1902] 2 K. B. 292. *Ystradowen Colliery Co. Ltd. v. Griffiths*, [1909] 2 K. B. 533. See also *Southall v. Cheshire County News Co. Ltd.* 5 B. W. C. C. 251; *Malone v. Cayzer, Irvine & Co.* 45 Sc. L. R. 351. In deciding whether the chain of causation between the injury and

the death is broken by the intervention of some independent agency, the rule of *Daniels v. New York, New Haven, & Hartford Railroad*, 183 Mass. 393, is to be followed under the workmen's compensation act as well as in other cases to which the rule is applicable. There is no difference between the rule laid down in the Daniels case and that in the English cases just cited.

But this error in law did not affect the result reached by the Industrial Accident Board. The decision of the board rests upon the rule of the Daniels case and hence need not be disturbed.

What has been said disposes of all the requests for rulings presented by the insurer. It does not appear that the board misdirected itself in any matter of law material to its decision on the facts found.

Decree affirmed.*

G. C. Dickson, for the insurer.

J. J. Mansfield, (J. F. Creed with him,) for the dependent widow.

FLORENCE A. KEITH & another vs. WILLIAM S. RADWAY & others.

Suffolk. January 15, 1915. — March 31, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Equity Jurisdiction, To relieve from results of fraud. *Corporation*.

A bill in equity by minority stockholders in a Massachusetts corporation against another stockholder, who held the majority of its stock and was alleged to be in control of it, alleged in substance that the defendant had owned the majority of the stock and that his mother owned a majority of the bonded indebtedness of a Maine corporation of the same name and that the two had had control of that corporation; that, in pursuance of a fraudulent purpose to reorganize that corporation in such a way as to gain possession of three fifths of the stock of the reorganized corporation without paying anything therefor, the defendant organized a Massachusetts corporation, had two nominees of his subscribe for a nominal number of shares and himself subscribed for the remainder of the shares personally but never paid any money therefor; that he then caused the Maine corporation to vote to sell its business and assets to him, subject to out-

* Of the Superior Court made by *Fessenden, J.*, affirming the decision of the Industrial Board.

standing bonds, for a certain sum to be paid for in stock of the Massachusetts corporation, received the stock subscribed for by him from the Massachusetts corporation, issued and delivered about two fifths of this to the Maine corporation for its business and assets, keeping the remaining three fifths, and then caused the Massachusetts corporation to issue bonds to take up at par the bonds of the Maine corporation. The defendant demurred to the bill. *Held*, that upon the allegations of the bill a case was shown where the Massachusetts corporation, for whose benefit the suit was brought, was entitled to relief of some sort, the form of which it was not necessary then to determine.

BILL IN EQUITY, filed in the Superior Court on May 26, 1914, and afterwards amended, by minority stockholders of the Credit Reporting Company of New England, a Massachusetts corporation, for the use and benefit of the corporation, seeking relief from the results of alleged fraud of the defendants as described in the opinion.

The defendants demurred to the bill on the ground that it was multifarious and for want of equity.

The demurrer was heard by *Wait*, J., and an interlocutory decree sustaining the demurrer was made on September 29, 1914. The plaintiffs appealed. On November 13, 1914, a final decree dismissing the bill was entered, notice of which was given to the plaintiffs by the clerk of the court on November 17, 1914. The defendants filed an appeal therefrom on December 5, 1914. In this court the plaintiffs asked under R. L. c. 159, § 28, for leave to appeal.

G. L. Wilson, for the plaintiffs.

J. A. Mahoney, for the defendants, submitted a brief.

DE COURCY, J. Leave to appeal from the final decree has been granted under R. L. c. 159, § 28, and the parties have argued the case on its merits. See *Boston & Albany Railroad v. Commonwealth*, 157 Mass. 68.

The plaintiffs are minority stockholders in the Credit Reporting Company of New England, a Massachusetts corporation, and bring this bill for its use and benefit on the alleged ground that the directors have refused to take action to enforce the rights of the corporation against the defendant William S. Radway, and further that they will take no such action as the defendants are in full and active control of the corporation. *Hill v. Murphy*, 212 Mass. 1, 3, and cases cited.

The bill is inartificially drawn. The second paragraph is extraneous; and those numbered 13, 14 and 15 seem to be irrelevant, except as a recital of the dealings between the individual parties. But in substance the bill alleges the following facts: The Credit Reporting Company of New England, a Maine corporation carrying on business in Boston, had an authorized capital of \$20,000, divided into two thousand shares of the par value of \$10 each. The defendant William S. Radway (hereinafter referred to as the defendant) and his mother Sarah E. Radway owned fourteen hundred and eighty-one shares and were in full and exclusive control of the company, the defendant being treasurer and general manager. It had outstanding \$7,900 of twenty-year six per cent bonds, of which \$6,300 were held in the name of Sarah E. Radway.

The defendant formed a fraudulent purpose and design to reorganize the corporation in such a way as to leave the stockholders in possession of two fifths of the value of its assets, and to possess himself of the remaining three fifths without paying anything for the same. In pursuance of this fraudulent scheme, on December 8, 1913, he had a corporation organized under the laws of Massachusetts, with an authorized capital of \$50,000, divided into five thousand shares of the par value of \$10 each, and bearing the same name as that of the Maine corporation. In effecting the organization he associated with him two of his employees, one Perry and one Moore, who acted under his direction and control. Each of these subscribed to ten shares of the capital stock, and the defendant subscribed to the remaining forty-nine hundred and eighty shares by an unqualified and unconditional personal subscription, but never has paid any money therefor. A meeting of the Maine corporation was held on December 21, 1913, and by means of the controlling stock of the defendants Radway it was voted to sell to the defendant (William S. Radway) the business and all the assets, cash and accounts receivable of the (Maine) corporation, subject to its outstanding bonds and other indebtedness, for \$19,540, payable in stock of the Massachusetts corporation at par. On December 24, 1913, the defendant caused to be issued to himself an original certificate for forty-nine hundred and eighty shares of the Massachusetts corporation. This he later exchanged for two certificates, one for nineteen hundred and

fifty-five shares, with which to pay the stockholders of the Maine corporation for its assets, in accordance with said vote, and the other for three thousand and twenty-five shares, which he retained for himself. The only consideration received by the Massachusetts corporation for its capital stock of \$50,000 was the above mentioned property of the Maine corporation, for which the defendant gave only a portion of that same stock of the par value of \$19,540. Subsequently the defendant caused the Massachusetts company to issue its bonds for \$7,900, in exchange for the bonds of the Maine corporation, and he had assigned to himself the shares in the Maine corporation which had been exchanged for shares in the Massachusetts company.

These allegations must be considered as true for the purposes of the demurrer. Baldly stated, and considering the substance of the transaction, they charge that the capital stock of a going concern was increased from \$20,000 to \$50,000, and that the promoter, acting through the machinery of two corporate organizations which he controlled, appropriated the increase of three thousand shares without paying to the corporation any consideration therefor. It needs no discussion to show that the law will permit no such fraud upon the corporation and its stockholders. The well recognized doctrine that a promoter stands in a fiduciary relation toward the corporation, and that he cannot lawfully take a secret profit in the sale to it of his own property, is thoroughly considered and formulated in the recent case of *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 188 Mass. 315; *S. C.* 203 Mass. 159. Plainly the Massachusetts corporation, for whose benefit this suit was brought, is entitled to some relief on the above facts. It is not necessary at this time to determine specifically in what form that relief shall be given.

The decrees of the Superior Court sustaining the demurrer and dismissing the bill are to be reversed, and a decree entered overruling the demurrer.

Decree accordingly, with costs.

ATTORNEY GENERAL *vs.* JOHN P. LYONS.
SAME *vs.* OKSAS EXPRESS COMPANY.

Plymouth. January 15, 1915. — March 31, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Quo Warranto. License. Municipal Corporations, Officers and agents. Express Company. Intoxicating Liquors, Transportation. Equity Jurisdiction, To enjoin transaction of unauthorized business by corporation.

Action of the mayor and aldermen of a city, in which licenses of the first five classes for the sale of intoxicating liquor are not granted, in issuing a permit under St. 1906, c. 421, as amended by St. 1911, c. 423, for the transportation of spirituous and intoxicating liquors into or in such city, if such permit is in proper form, cannot be reviewed in quo warranto proceedings brought by the Attorney General against the person, firm or corporation who received the permit, although such person, firm or corporation is not "regularly and lawfully conducting a general express business" according to the requirement of the amended § 2 of the statute.

Whether, under any circumstances such action of the mayor and board of aldermen could be reviewed in appropriate and seasonable proceedings, *or whether* the action is a practical detail in the administration of local affairs which, so long as honestly exercised, is vested finally in the mayor and board of aldermen, was not decided.

St. 1906, c. 372, providing that upon an information in equity in the name of the Attorney General at the relation of the commissioner of corporations the Supreme Judicial Court may enjoin a corporation from assuming or exercising any franchise or privilege or transacting any kind of business not authorized by its charter and the laws of the Commonwealth, does not give that court power in such proceedings to enjoin a corporation to which, by the mayor and aldermen of a city in which licenses of the first five classes for the sale of intoxicating liquors are not granted, a permit has been granted in due form under St. 1906, c. 421, as amended by St. 1911, c. 423, for the transportation of spirituous and intoxicating liquors into or in such city, from conducting business in accordance with the permit, although the holder of the permit is not "regularly and lawfully conducting a general express business" according to the requirement of the amended § 2 of the statute.

RUGG, C. J. These are quo warranto proceedings brought by the Attorney General for and in behalf of the Commonwealth, alleging that the defendants, "not regularly and lawfully conducting a general express business," were granted permits, unobjectionable in form, to transport intoxicating liquors for hire and reward by the mayor and aldermen of the city of Brockton,

a city in which licenses of the first five classes for the sale of intoxicating liquors are not granted, contrary to the provisions of St. 1906, c. 421, as amended by St. 1911, c. 423; wherefore prayers are made that the defendants severally "be forejudged and excluded of and from the said liberties, privileges and franchises." Demurrers were filed to these informations and the cases are here on reports.*

In effect this court is asked to review the action of the local board in issuing these permits. There is no ground for the use of quo warranto for this purpose. The history of that process in this Commonwealth is considered somewhat at length in *Attorney General v. Salem*, 103 Mass. 138, *Attorney General v. Sullivan*, 163 Mass. 446, and *Haupt v. Rogers*, 170 Mass. 71. Without going into that subject again, it seems plain that its function cannot be stretched to include the object here sought. The granting or the refusal of the permit was within the jurisdiction of the mayor and aldermen. They have not exceeded their jurisdiction and so far as concerns form have acted without flaw.

It is urged that an error has been made in the determination of a question of fact. The revision of such a quasi judicial action is not a proper function of quo warranto. Its appropriate use is not to obtain a review of the decision of another board or tribunal as to a matter within its jurisdiction. The cases from Illinois upon which the petitioner relies, *People v. Heidelberg Garden Co.* 233 Ill. 290, and others there cited, rest upon a local statutory extension of the scope of quo warranto, while *State v. Topeka*, 30 Kans. 653, was a proceeding against a city for undertaking to exercise a jurisdiction prohibited by the Constitution of that State.

It is doubtful whether in any event the attempt to exercise a license properly can be described as a liberty, franchise or privilege as those words are used in quo warranto proceedings. See *Dean v. Healy*, 66 Ga. 503, and *State v. Green*, 112 Ind. 462. That point, however, need not be decided.

It is not necessary to determine whether under any circumstances by appropriate and seasonable proceedings the deter-

* By *Hammond, J.*, who stated in each report that he "was of the opinion that the demurrer should be sustained."

mination of the local board can be reviewed, or whether such determination is a practical detail in the administration of local affairs which so long as honestly exercised is vested finally in that board. See *McLean v. Holyoke*, 216 Mass. 62.

It was said during argument, in answer to questions from the bench, that there was no other remedy through ordinary channels for the evil alleged to exist, because it was the practice in the local courts to refuse to receive complaints for the violations of law such as here are alleged. If officers of such courts refuse to perform their duties, remedy is afforded for compelling them to act. In any event there is no ground for putting quo warranto to an unexampled use.

The plaintiff in the second case has asked to amend his information into proceedings in equity under St. 1906, c. 372. See *Attorney General v. New York, New Haven, & Hartford Railroad*, 197 Mass. 194, 198. But manifestly that statute is not adapted to the state of facts here disclosed. The defendant corporation is not exercising a franchise nor doing a business not permitted by its charter or the laws of the Commonwealth. It simply is doing the quite different thing of acting under a license regularly granted on its face, which, it is contended, the board, clothed by law with jurisdiction in the premises, has mistakenly granted.

Information dismissed.

W. G. Rowe, for the plaintiff.

G. F. McKelleget, (*E. J. Parry* with him,) for the Oksas Express Company.

J. E. Handrahan, for the defendant Lyons, submitted a brief.

FRANKLIN WORCESTER & another vs. GEORGE W. COOK.

Middlesex. November 13, 16, 1914. — April 1, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Agency, Existence of relation, Fidelity of agent. Evidence, Of agency, Declaration of deceased person. Deceit.

At the trial of an action of tort for deceit practiced upon the plaintiff by an alleged agent of the defendant in negotiations resulting in the sale of timber to the plaintiff, it appeared that the alleged agent had died and there was evidence that, before the commencement of the action, he had stated to witnesses for the plaintiff that the defendant had "asked him to sell" the timber, "to find a customer for it," and that, if he should do so, the defendant "would make it right with him," that, after the close of the transaction, he had stated that he had said to the defendant that he "thought he had very small pay for the work he had done," and that the defendant had paid him \$150 and had said that that was all he was willing to allow him. The receipt given to the defendant by the alleged agent was written by the defendant and purported to acknowledge "payment in full for services rendered in connection with the sale of the" lot. There also was evidence that the plaintiff introduced himself to the defendant at the time of the sale and stated that he was the man who had been talking with the alleged agent "who claimed to be authorized to sell the timber," and informed the defendant that he was there "according to arrangements made by" the alleged agent "to complete the transaction, if everything, the representations made, were truthful and that he had authority to sell the lot, and" the defendant "could give . . . a good title to the property;" and that the defendant said "I guess everything is all right." *Held*, that it was a question for the jury as to whether the alleged agency existed.

In an action of tort for deceit practiced by an alleged agent of the defendant in negotiations resulting in the sale of standing timber to the plaintiff, upon evidence tending to show that, before the sale, the plaintiff had some talk with the agent about his helping the plaintiff to sell the timber, and that, two or three months after the sale, he paid the agent \$250 "for services in anticipation," it cannot be ruled as a matter of law that the agent was disqualified from acting for the defendant.

Where, at the trial of an action of tort for deceit alleged to have been practiced upon the plaintiff by an agent of the defendant to induce him to purchase the standing timber on certain lots of land of the defendant, there is evidence tending to show that one could not determine by inspection how many acres of standing timber there were in the tract on account of the character of the timber and the configuration of the lots, and that the agent made false statements which reasonably were understood by the plaintiff to mean that an actual survey had been made of the lots and that they contained about ninety acres, whereas they contained only sixty-five acres, a verdict should not be ordered for the defendant, because it cannot be ruled as a matter of law that the false representations were

not actionable, and a finding is warranted that the plaintiff acted reasonably in relying on the agent's statements and that the statements were untrue.

CONTRACT OR TORT for damages caused by alleged false representations made by one Andrew T. Bemis to the plaintiffs in negotiations resulting in the purchase on April 18, 1910, by the plaintiffs from the defendant, who was the administrator of the estate of Charles Brewer, late of Petersham, of certain standing timber. There were two counts in the declaration. The first count was in contract and the second was in tort for deceit. Writ dated October 20, 1911.

Previous to the trial of the case, the plaintiffs waived the first count of the declaration.

The case was tried before *Brown, J.* The testimony of the plaintiff Franklin Worcester in relation to a payment by him to Bemis, referred to in the second numbered paragraph of the opinion, was in substance that, preceding the sale, he asked Bemis if he would help him to market the timber in case the plaintiffs should buy it from the defendant, that, after the sale by the defendant to the plaintiffs and "before there was even a beginning of any marketing of the timber," he paid Bemis \$250, "not for selling this timber, but in assisting me in the operation of the timber. I paid him for services in anticipation."

Other material evidence is described in the opinion. At the close of the evidence the judge ordered a verdict for the defendant and reported the case for determination by this court, a new trial to be ordered if the verdict should not have been ordered for the defendant; otherwise, judgment to be entered for the defendant.

C. F. Choate, Jr., for the plaintiffs.

H. Parker, (*C. F. Rowley* with him,) for the defendant.

DE COURCY, J. The principal question raised by the exceptions is whether there was evidence on which the jury could find that Bemis, when he made the alleged representations with respect to the survey and acreage of the timber, was the agent of the defendant. There was evidence of the following facts. The Brewer heirs had empowered Cook to deal with the property as though he were the owner. In October, 1909, he mailed to all the lumber men in New England printed circulars describing the quality and estimated quantity of the growth. Andrew T.

Bemis, who was in the business of cutting off lumber, and who bought and sold some as well, brought this timber to the attention of the plaintiffs and secured them as purchasers after a number of conversations on the lot and elsewhere. On April 18, 1910, the plaintiff Franklin Worcester (hereinafter referred to as the plaintiff) met the defendant according to arrangements made by Bemis and completed the purchase.

1. The letters in the record which passed between Bemis and the defendant from November 8, 1909, to February 15, 1910, seem to indicate that at least during that period Bemis was not acting as the defendant's agent, but as a broker or middleman endeavoring to bring the parties together. There was other evidence, however, bearing on the issue of agency. Bemis died on January 30, 1913, and declarations made by him before the commencement of this action were admitted under R. L. c. 175, § 66. For instance he said that "Mr. Cook asked him to sell" this lot, and that "he saw Mr. Cook, and Mr. Cook asked him to find a customer for it." Emma B. Bemis, who testified to this, said further that in July she heard Bemis say to the defendant that "he thought he had very small pay for the work he had done," and that Cook at that time paid him \$150, and said that was all he was willing to allow. The receipt which Bemis signed was prepared by the defendant and purported to be "payment in full for services rendered in connection with the sale of the Brewer wood lot." One Bowen testified that Bemis had told him, among other things, that "Mr. Cook wanted he should sell it [the timber lot] for him if he could." Mr. Garrity, formerly counsel for the plaintiffs, was told by Bemis that Cook, at their first interview, told him (Bemis) that if he should find a purchaser he (Cook) would make it right with him. Finally, when the plaintiff introduced himself to the defendant on April 18, 1910, as the man who had been talking with Mr. Bemis, "who claimed to be authorized to sell the timber on the Brewer estate," he informed Cook that he was there "according to arrangements made by Mr. Bemis to complete the transaction, if everything, the representations made, were truthful, and that he had authority to sell the lot, and Mr. Cook could give me a good title to the property;" and the defendant said in reply, "I guess everything is all right."

The truthfulness of this testimony and its weight as compared with that introduced by the defendant is not for us to determine. We are of opinion that it entitled the plaintiffs to go to the jury on the question of Bemis's agency.

2. It appeared in evidence that the plaintiff himself, before buying the lot, had some talk with Bemis about helping him to sell the timber; and that he paid Bemis \$250 in June or July, for services. It is strongly argued that Bemis was disqualified by this transaction from further acting as agent of the defendant. But it cannot be so ruled as matter of law on the facts disclosed by the record as it now stands. See *Rice v. Wood*, 113 Mass. 133; *Quinn v. Burton*, 195 Mass. 277; *Little v. Phipps*, 208 Mass. 331; *Ebert v. Haskell*, 217 Mass. 209.

3. There was evidence that Bemis assured the plaintiff that an actual survey had been made of the timber lots, and that there were about ninety acres in the two lots. While Bemis did not expressly state that this acreage was the area ascertained by the survey, it could be found that his language reasonably conveyed that meaning to the plaintiff, and both men used that figure in estimating the quantity of timber that could be cut. This distinguishes the case from *Mabardy v. McHugh*, 202 Mass. 148, *Mooney v. Miller*, 102 Mass. 217, and *Gordon v. Parmelee*, 2 Allen, 212, notwithstanding that the boundaries were designated to the plaintiff; and brings it within the principle of *Roberts v. French*, 153 Mass. 60.

It should be added that it does not appear that the defendant was informed that Bemis had told the plaintiff that the lot had been surveyed; and hence the defendant's responsibility for that representation cannot rest on ratification. *Combs v. Scott*, 12 Allen, 493.

4. It could be found that the representations made by Bemis with reference to a survey were rightly relied upon by the plaintiff as an inducement to purchase. There was evidence that one could not determine by inspection how many acres were in the lots, on account of the character of the timber and the configuration of the land. And a definite statement of measurement well might divert a purchaser from making further investigation.

5. Finally there was evidence that the representations were untrue. Instead of a timber acreage of ninety acres there were

only about sixty-four, as shown by a survey made for the defendant before July, 1909.

In accordance with the report the verdict ordered for the defendant must be set aside, and a new trial granted.

So ordered.

WILLIAM E. CARTER & another vs. EXCHANGE TRUST COMPANY
& another.

Suffolk. January 14, 1915. — April 1, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Pledge. Mortgage. Equity Jurisdiction, Equitable set-off, Adequate remedy at law. Judgment.

Where the nominal holder of the record title to certain real estate subject to a first mortgage for \$7,500 and to a second mortgage for \$5,000 which is held by the beneficial owner, at the request of the beneficial owner signs and delivers to a bank a note for \$2,000 and the beneficial owner thereupon delivers to the bank his second mortgage as collateral security for that note, the bank, in the absence of a special agreement to that effect, is under no obligation to redeem and pay the first mortgage when it becomes due in order to protect the second mortgage which it holds as collateral.

After judgment has been entered for the plaintiff in an action upon a promissory note against the maker of the note, who is the nominal holder of the record title to certain land subject to a first and a second mortgage, the second mortgagee being the beneficial owner of the land who had delivered the second mortgage to the plaintiff as collateral security for the note of the defendant, the judgment debtor and the beneficial owner of the land, whose remedy at law is adequate, cannot maintain a suit in equity against the judgment creditor to have set off against the judgment a sum of money received by the judgment creditor from the first mortgagee as surplus proceeds from a foreclosure of the first mortgage by sale, even although before the entry of the judgment the amount of such surplus could not be ascertained and therefore could not be pleaded in the action upon the note.

CROSBY, J. The plaintiffs in this suit in equity seek to enjoin the defendants from enforcing a judgment against them and to be allowed to set off certain claims against that judgment.

The plaintiff Harrison Loring, who was the owner of certain real estate, conveyed it to the other plaintiff, Carter, and took a second mortgage back from Carter to secure a note for \$5,000.

The property was subject to a first mortgage for \$7,500, held by the Wareham Savings Bank.

It is agreed that the real estate in fact belonged to Loring, and that Carter, who was a clerk in Loring's employ, was a mere nominal holder of the record title, he being called a "straw man."

The plaintiff Loring afterwards applied to the defendant trust company for a loan of \$4,000, which was refused; but he finally was granted a loan of \$2,000, and a note for that amount, signed by Carter and indorsed by Loring, was given to the trust company and the \$5,000 note and mortgage, held by Loring, was transferred to the trust company as collateral security for the loan.

The case was referred to a master, who found that the treasurer of the Wareham Savings Bank saw Loring in regard to overdue interest upon its loan, and also with reference to unpaid taxes upon the real estate; that Loring referred him to the trust company and thereupon the treasurer saw one Tibbetts, the secretary of the trust company, and made a demand upon him for the overdue interest, which was refused; that shortly afterwards Tibbetts stated to the treasurer of the savings bank that his company would pay the interest and attorney's fees incurred in connection with the foreclosure proceedings, providing such proceedings were abandoned. The bank then demanded payment of the overdue interest and attorney's fees, and agreed to furnish the trust company later with the amount of these items.

The master found that Tibbetts agreed with the treasurer of the bank that the trust company would pay these charges as soon as he learned the amounts, and that the bank agreed to accept these amounts and to abandon any contemplated foreclosure proceedings. He also found that the bank, shortly after the agreement above referred to, began proceedings to foreclose its mortgage without furnishing to the trust company the amounts due, as previously had been agreed.

The master further found that there was no consideration for this agreement between the bank and the trust company, unless the facts as above stated constituted such consideration. He found that Loring first learned that the bank was to begin proceedings to foreclose its mortgage in the latter part of February, and immediately saw Tibbetts with reference to it.

The master states in his report that Loring testified that Tib-

betts said to him: "We will take care of the Trust Company's interest in the property." He further states that Loring also testified that he (Loring) understood this to mean that "the Exchange Trust Company would do whatever was necessary to prevent the foreclosure of the first mortgage;" that he relied upon this statement and took no steps to raise money to pay the Wareham Savings Bank the amount due.

The master found that there was no satisfactory proof of any agreement between Loring and the trust company, and that "it appears to have been a casual talk in which whatever was said was easily susceptible of misunderstanding between the parties." He found, however, that Loring understood from this conversation that the trust company would in some way prevent the foreclosure, and on account of such belief he (Loring) took no steps to prevent it.

The master further found that Tibbetts did not state nor intend to state to Loring that the trust company would pay the bank whatever might be necessary, including the principal, to prevent the foreclosure. He also found that it was extremely doubtful whether he (Loring) could have raised the money necessary to pay the Wareham Savings Bank what was due, including the principal of the mortgage, at any time before the foreclosure.

The findings of the master cannot be set aside or disregarded unless clearly wrong. He saw the parties and heard the evidence, which is not reported in full. We are of opinion that his findings must stand.

It is difficult to understand how Loring could have believed that the trust company would protect his interests by preventing the foreclosure of the first mortgage; all that Tibbetts, representing the trust company, said to him was: "We will take care of the Trust Company's interest in the property." This was far short of saying that they would protect his (Loring's) interests.

In view of the facts found by the master, it is apparent that Loring properly could not have relied upon the trust company to protect his interests, but should have prevented the foreclosure by his own efforts, although the master found that it was "extremely doubtful" whether he would have been able to raise the money at any time before the foreclosure.

Besides, the master has found that there was no consideration

for a promise, had any been made by Tibbetts, to protect Loring.

While, as the plaintiff contends, the pledgee of property is bound to use due care when he undertakes to realize upon the pledge, and is bound to exercise reasonable diligence in caring for such property, we are of opinion that that principle has no application to this case. If, as the master found, the \$5,000 second mortgage was held by the trust company as collateral to secure the payment of the \$2,000 loan, still the trust company was under no obligation to redeem and pay the first mortgage in order to protect the second mortgage held by it as collateral, in the absence of any agreement to that effect.

The case of *Jennings v. Moore*, 189 Mass. 197, cited by the plaintiffs, is not applicable to the case at bar. Upon the findings of the master there is nothing to show that the trust company ever promised to protect the plaintiff's interests, nor are there any findings from which a constructive trust can be found to exist. There is nothing to show that the officers of the trust company acted in bad faith or in fraud of the plaintiff's rights. *Bourke v. Callanan*, 160 Mass. 195. *Rose v. Fall River Five Cents Savings Bank*, 165 Mass. 273, 275. *Hall v. First National Bank of Chelsea*, 173 Mass. 16, 19.

The only other question presented by the appeal is whether the plaintiffs are entitled to have allowed in set-off and reduction of the judgment rendered upon the \$2,000 note any sum received by the trust company from the Wareham Savings Bank as surplus proceeds of the foreclosure sale.

We are of opinion that after the action upon the \$2,000 note (brought by the defendant Daly for the benefit of the trust company) had become merged in a judgment, such judgment cannot be attacked or reduced by any claim which the plaintiffs may have against the trust company arising from the payment to it of such surplus proceeds of the foreclosure. And this is true, notwithstanding the fact that the amount of such surplus, so received, not having been ascertained could not have been pleaded in set-off before the judgment was entered.

While equity, in order to avoid injustice, ordinarily will enforce, when necessary, a set-off of demands between the same parties, still that doctrine does not apply to a case like this, where its effect

would be to attack and impair a judgment regularly entered in another action.

The case of *Cromwell v. Parsons*, 219 Mass. 299, relied on by the plaintiff, is to be distinguished from the case at bar. In that case it was held that although there was at law no right of set-off, because the parties were different, in equity the plaintiff should have the right to set off his demand because the transaction was mutual between the same parties and grew out of the same transaction. It is to be noted that the question in that case involved the right to set off an execution held by the plaintiff against another execution held by the defendant, and was not a case where, as here, the plaintiff seeks to set off a demand against a judgment rendered in favor of the defendant Daly against these plaintiffs.

The plaintiffs have a complete and adequate remedy at law against the trust company to recover any sum that may have been received by it as surplus proceeds of the foreclosure sale.

The result is that the final decree* should be affirmed; and it is

So ordered.

W. M. Noble, for the plaintiffs.

J. B. Dore, for the defendants.

NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY vs. PAULINE PORTER, administratrix.

Norfolk. January 14, 15, 1915. — April 1, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Contract, Performance and breach. Railroad, Spur track.

If a proprietor of coal sheds constructs a spur track on the land of a railroad corporation connecting the main tracks of the railroad with the sheds, and

* After a hearing by *Jenney, J.*, an interlocutory decree was entered confirming the master's report. After a further hearing by *Wait, J.*, a final decree was entered dismissing the bill. The plaintiffs appealed.

the railroad corporation agrees with such proprietor that in transporting coal for him it will deliver the coal at his sheds, the transportation does not come to an end until the cars are placed on the spur track adjoining the sheds and, until this has been done, in the absence of a special stipulation, no action can be maintained for the freight money, because the contract of transportation has not been performed.

CONTRACT against the administratrix of the estate of Robert D. Porter, late of Stoughton, for \$1,270.45 on an account annexed which set forth various items under the headings "Car Service" and "Freight Bills." Writ dated December 20, 1912.

The defendant filed an answer and a declaration in set-off on a judgment for \$125 with interest, for \$50 for liquidated fire damages and for \$24.43 for liquidated damages for failure to deliver freight. The plaintiff in an answer to the declaration in set-off admitted its liability on the judgment for \$125 and for the \$50 for fire damages, but denied its liability for the \$24.43 for failure to deliver freight and as to this pleaded the statute of limitations.

In the Superior Court the case was submitted to *Dubuque, J.*, upon an agreed statement of facts as follows:

"It is agreed by the parties in the above entitled cause that the defendant's intestate, hereinafter referred to as the defendant, owes the plaintiff the sum of \$467.45, appearing as 'Freight Bills' in the plaintiff's declaration; and that the plaintiff owes the defendant the sum of \$175 claimed in set-off; that the sum of \$803, also appearing in said declaration, is the correct sum due for demurrage, provided the plaintiff had the right to assess the same; that the charge of \$1 per day for demurrage was a reasonable charge; that the plaintiff's demurrage rules effective during the period for which said demurrage was assessed were the rules effective January 10, 1909, bearing the number 'I.C.C. No. X6;' that said rules were properly filed and posted as required by law; that said rules may be and hereby are made a part of this agreement; that the defendant had a private side track or spur track constructed upon the land of the plaintiff and connecting with the main line tracks of the plaintiff and running to the defendant's coal shed; that the defendant had for some time prior to June, 1909, enjoyed a privilege granted by the plaintiff called 'weekly credit,' under which privilege the defendant was permitted to pay his freight bills on presentation once a week; that

prior to June, 1909, this privilege had been withdrawn by the plaintiff; that after said privilege had been withdrawn certain cars of coal came to Stoughton by the plaintiff's lines, consigned to the defendant; that due notice of the arrival of said cars was given to the defendant and demand made for the freight which had not yet been paid; that the defendant refused to pay said freight until the cars were placed upon his side track, adjoining his sheds, when he desired to unload them; that the defendant said he would pay the freight after the cars were placed upon his side track; that the plaintiff placed the cars upon its public delivery tracks (but with no intention on the part of the plaintiff to deliver to the defendant unless the freight was paid); and refused and declined to place said cars upon the defendant's side track prior to the payment of the freight charges; that the sum of \$803 was assessed as demurrage upon said cars, which is the amount in dispute."

The judge found for the plaintiff in the sum of \$1,095.45 with interest at six per cent from the date of the writ, and at the request of the parties reported the case for determination by this court. If the finding was correct in law, judgment was to be entered thereon. If it was incorrect in law, judgment was to be entered for the plaintiff in the sum of \$292.45 with interest at six per cent from the date of the writ.

E. F. Leonard, for the defendant.

A. W. Blackman, for the plaintiff.

LORING, J. The transportation of the coal did not come to an end until the cars were placed on the side track "running . . . to said second party's [the intestate's] coal shed," maintained by the plaintiff on its own land, under the agreement between the plaintiff and the intestate, for the delivery of coal consigned to the intestate. The plaintiff's contention is that it "properly could refuse to place said cars where the defendant [the intestate] wanted them placed before the defendant [the intestate] paid the freight." But to this contention we cannot assent. In our opinion the question is whether the plaintiff was entitled to the freight before it had completed the transportation. It is plain that it was not. The case comes within the elementary proposition that in the absence of a special stipulation a man is not entitled to his pay until he has finished his job. See for example *Adams v. Clark*,

9 Cush. 215, 216, 217. There is nothing to the contrary in the cases cited by the plaintiff.

The cars in question were "Cars taking private track delivery" within the plaintiff's "Rules and Instructions regarding Demurrage and Car and Track Service." For that reason demurrage did not begin to run when the cars were placed upon the plaintiff's public delivery tracks.

The private delivery track in question was on the plaintiff's land, and by the terms of the agreement between the plaintiff and the intestate was subject to "the absolute control and management of" the plaintiff. There was no difficulty therefore in the plaintiff maintaining its lien for the freight after the cars were placed on this track. *Lane v. Old Colony & Fall River Railroad*, 14 Gray, 143.

By the terms of the report the entry must be: Judgment for the plaintiff in the smaller sum, to wit, \$292.65, with interest from the date of the writ; and it is

So ordered.

ELIZABETH P. MACNAUGHTAN vs. COMMONWEALTH.

Berkshire. February 23, 1915. — April 1, 1915.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Evidence, Of value. Mount Everett State Reservation.

At the trial of a petition for the assessment of damages for land taken under St. 1908, c. 571, for the Mount Everett State Reservation, where the land taken consists of a parcel of about two hundred and fifty acres including the summit of the mountain and of a parcel of about sixty-two acres including a pond of sixteen acres, the value of both parcels being chiefly sentimental "as a sight seeing place," it is within the discretionary power of the presiding judge to exclude evidence of the value of a parcel of land on the other side of the mountain, which is without value as a mere sight seeing place but has value because of its wood and timber and because of its connection with other properties; even if the dissimilarity between the land taken and land whose value is offered in evidence does not require the exclusion of the evidence upon objection.

At the trial of a petition for the assessment of damages for land taken under statutory authority for a public reservation, it is within the discretionary power of the presiding judge to exclude evidence of the price paid for the land taken under an option, which was procured, by one who afterwards became a

member of the commission in charge of the reservation and conveyed the land to the Commonwealth, for the purpose of showing to the Legislature the price for which the land could be bought.

PIERCE, J. On June 2, 1908 (St. 1908, c. 571), the Legislature "authorized and directed" a commission "to take, or acquire by purchase, gift or otherwise, land situate in the Mount Everett mountain range in the towns of Mount Washington and Sheffield, and the land so acquired shall be known as the Mount Everett State Reservation." In pursuance of this direction and authorization the commission appointed under the act took from the petitioner two parcels of land, one known as the "Dome tract," containing about two hundred and fifty acres, including the summit of the mountain, and the other known as the "Pond tract" containing about sixty-two acres, including a pond of sixteen acres, situated on the mountain a few hundred feet from the summit. The value of these tracts did not consist so much in the land itself as in its "sentimental value . . . as a sight seeing place," or in the lake except "as an attraction to such a property."

Between these two parcels and extending beyond them down the other side of the mountain was the Whitbeck land. This land and the two parcels taken were in respect to ravines, ledges and general roughness of surface topographically similar; however there was no pond upon the Whitbeck land and it was without value as a mere sight seeing place. But because of its wood and timber, and because of its connection with other properties, it had a greater value as land and a less value due to location than the parcels taken.

After the introduction of the bill but before its enactment, one Collins obtained from Whitbeck, the owner of the Whitbeck parcel, an option of purchase for the purpose of showing to the Legislature the price for which the land could be bought. In October, 1908, following the enactment of the statute, Collins, now a member of the commission, exercised his option and the land was conveyed to the Commonwealth.

At the hearing upon this petition for the assessment of damages under § 4 of the act the respondent offered to show the price it paid, which was that named in the option, but the evidence was excluded * and the respondent excepted.

* By Fox, J., who presided at the trial.

We are of opinion that there was such dissimilarity between the Whitbeck property and the two parcels of the petitioner as to justify if it did not require the exclusion of the testimony. Nor can we say that the optional price procured for the admitted purpose of influencing legislation was so indubitably fair as to be a reasonable test of market value.

"Questions which arise as to the competency of evidence of this character must be left largely to the discretion of the presiding judge." *Burley v. Old Colony Railroad*, 219 Mass. 483, 485. *Paine v. Boston*, 4 Allen, 168.

Exceptions overruled.

The case was submitted on briefs.

H. C. Atwill, Attorney General, *A. E. Seagrave*, Assistant Attorney General, for the Commonwealth.

J. F. Noxon & R. G. Dodge, for the petitioner.

COMMONWEALTH vs. WOLF SILVERMAN.

Hampden. February 25, 1915. — April 1, 1915.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Junk Dealer. License. Words, "Dealer."

One who sells to a licensed junk dealer junk and old metals on sixteen different dates within two months, but who keeps no shop in the city in which the sales are made, may be found to be a "dealer" in junk and old metals in that city within the meaning of R. L. c. 102, § 29, providing that such a dealer may be required by a city ordinance to be licensed.

In construing the word "dealer" in a statute or ordinance requiring dealers in certain articles to be licensed there would seem to be no valid distinction between one who sells and one who buys such articles.

COMPLAINT, received and sworn to in the Police Court of Holyoke on September 21, 1914, under R. L. c. 102, §§ 29-32, charging the defendant with being a dealer in and the keeper of a shop for the purchase, sale and barter of junk and old metals in the city of Holyoke without a license, the complaint containing three counts as described in the opinion.

In the Superior Court the defendant was tried before *Hamilton, J.*, the facts as agreed to by the parties being stated in the opinion. The material portion of an ordinance of the city of Holyoke adopted under the provisions of § 29 of the statute was included in the facts agreed to. The jury returned the verdict "Guilty as dealer but not guilty as keeper of a shop," and at the request of the defendant the judge reported all questions of law arising upon the agreed facts for determination by this court. If the sales there referred to made the defendant a dealer within the meaning of § 29 of the statute, the verdict of guilty was to stand; otherwise, a verdict of not guilty was to be entered.

Section 29 of R. L. c. 102 is as follows:

"The mayor and aldermen of any city except Boston, and in Boston, the board of police, and the selectmen of any town, if ordinances or by-laws therefor have been adopted in such city or town, may license suitable persons to be dealers in and keepers of shops for the purchase, sale or barter of junk, old metals or second-hand articles, in such city or town, subject to the provisions of sections one hundred and eighty-six to one hundred and eighty-nine, inclusive, and may revoke such licenses at pleasure."

Section 1 of the ordinance of the city of Holyoke, which was made a part of the agreed facts and under which the complaint was brought, was as follows:

"No person shall be a dealer in or keeper of a shop for the purchase, sale or barter of junk, old metals or second-hand articles in this city, unless he is duly licensed therefor by the board of aldermen and shall exhibit his license when requested to do so."

The case was submitted on briefs.

M. N. Slotnick, for the defendant.

C. P. Niles, District Attorney, & *F. M. Myers*, for the Commonwealth.

CROSBY, J. The first count of the complaint charges the defendant with being a dealer in and keeper of a shop for the purchase, sale or barter of old metals, in Holyoke, without being duly licensed therefor by its board of aldermen.

The second count charges the same offence, except that it specifies sixteen different dates.

The third count alleges that the defendant was a keeper of a

shop for the purchase, sale and barter of junk, without being duly licensed therefor.

The report states that the defendant had not the license referred to in R. L. c. 102, § 29, during the year 1914, in Holyoke, but that he had such a license during that year in the town of South Hadley, in this Commonwealth.

The jury returned a verdict of "Guilty as dealer, but not guilty as keeper of a shop."

The parties agreed that on the dates set out in the second count of the complaint the defendant did sell junk and old metal in Holyoke to one Belsky, who was a licensed junk dealer in Holyoke; the only question then is whether the sales so made by the defendant constituted him a "dealer" within the meaning of § 29 above referred to.

Section 29 of the statute provides for the licensing of dealers in junk, old metals or second hand articles, and also for the licensing of those who are keepers of shops for the purchase, sale or barter of the same articles. The clear intent of the statute is to require dealers, as well as the keepers of shops, to be licensed for the purchase and sale of such articles. *State v. Cohen*, 73 N. H. 543. See also Sts. 1902, c. 187; 1910, cc. 193, 554.

It was not the purpose of the Legislature to prevent or curtail the business of dealing in junk and old metals, but to regulate the business by causing the dealers therein, and those who keep shops for the carrying on of such business, to be licensed. The principal objects of the statute are to determine what persons shall be engaged in the business and to make it possible that junk, old metals and second hand articles stolen may be traced and restored to their owners, and that the thief may be detected and convicted.

We are of opinion that, having in mind the mischief at which the statute was aimed, one who sells junk and old metals on sixteen different dates within two months, as is admitted was done by this defendant, may be found to be a "dealer" within the meaning of the statute.

The keeper of a shop under the statute may be required to keep among other things a record of every purchase and a description thereof, the date of such purchase and the name and residence of the person from whom such purchases are made. On the other

hand, one who is simply a dealer cannot be required to keep any record of purchases or sales, the statute providing only that suitable persons shall be so licensed as dealers.

Independently of the fact that the defendant was licensed as a junk dealer in South Hadley, we are of opinion that the sales made by him were sufficient to warrant the conviction under the statute. In *Commonwealth v. Hood*, 183 Mass. 196, it was held that one who kept a shop where old gold and silver was bought was required to have a license under the statute and could be found to be a dealer although no sales were made.

In construing the meaning of the word "dealer" there would seem to be no valid distinction in the statute between one who sells and one who buys such articles. As was said by this court in *Commonwealth v. Hood*, *supra*, "Every such purchase was a 'deal,' and the defendants were traffickers or dealers in old gold and silver."

In *McKenzie v. Day*, [1893] 1 Q. B. 289, Lord Coleridge, C. J., in construing a statute in reference to illegal dealing in intoxicating liquors, said: "The plain meaning of the word 'deal' unquestionably extends to buying as well as selling; there must be two parties to what is called a 'deal;' a man cannot deal with himself; there must be some one else for him to deal with."

In *Nelson v. State*, 111 Wis. 394, 399, it was held that "the act of setting out liquor for another to drink at the request of a third person is a dealing with such other as clearly as giving or selling it to him." *State v. Silverman*, 75 N. H. 50. 13 Cyc. 285, 286, 287, and notes.

A dealer in intoxicating liquors "is one who makes successive sales as a business." *Overall v. Bezeau*, 37 Mich. 506.

We are of opinion that the conclusion which we have reached is consistent with the language of the statute and that a contrary interpretation would militate against its sensible and reasonable construction, having in mind the evils which it was intended to prevent. It reasonably might be found from the facts reported that the defendant was a dealer and consequently was guilty of the offence charged, as he had not been duly licensed as such dealer.

Verdict of guilty to stand.

HOMER GOODWIN vs. EVANS R. DICK & others.

Suffolk. November 12, 1914. — February 24, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Deceit. Election. Damages, In tort.

In an action by a stockbroker against another stockbroker for false and fraudulent representations that certain shares of mining stock offered for sale were treasury stock, whereby the plaintiff was induced to purchase some of the shares and suffered loss, if it appears that the defendant made the statement that the shares were treasury stock and that this statement was false and was known to the defendant to be false and was relied upon by the plaintiff and was material, but it also appears that the mining stock not only was worthless but that it would have been equally worthless if the shares had been treasury stock, it is right for the presiding judge to order a verdict for the defendant; for the plaintiff by bringing his action for deceit has elected to affirm his purchase of the shares, and is bound by the rule of damages that he can recover only the difference between the value of the stock that he got and the value of the treasury stock that he would have got if the defendant's representation had been true, that is to say, nothing at all, so that he has failed to prove that he suffered damage by the defendant's false statement, which is an essential element of his cause of action.

DE COURCY, J. The plaintiff, who is a stockbroker in Boston, bought from the defendants, who are stockbrokers in New York, five hundred shares of the Boston and Alta Copper Company. He alleges that he was induced to subscribe thereto by the following statement in a circular issued by the defendants: "Having been requested to use our business facilities for marketing some of the Treasury Stock of the Boston and Alta Copper Company, we have carefully considered the history and prevailing conditions surrounding this enterprise, and the reputation, skill and ability of the men associated therewith; and have concluded that we can, with propriety, recommend the stock as being an attractive mining investment, likely to have very great value with the further development of the property."

The auditor to whom the case was referred found that the plaintiff bought and paid for the stock relying upon the statement that the shares offered for sale were treasury stock; that this was a material statement; that the plaintiff was justified in relying upon it; and that it was false and was known by the defendants

to be false, as the stock in fact was held by the Railways Company General as collateral security and also was subject to an option in favor of the defendant E. R. Dick and others. At the trial the defendants introduced evidence as to the entire transaction, which need not be recited in view of the conclusion at which we have arrived.

Assuming that the facts were as found by the auditor, the plaintiff had the choice of two remedies. He might have elected to rescind the contract which had been induced by the false representations, and have recovered the money he paid, on returning the consideration received by him. *Nash v. Minnesota Tile Ins. & Trust Co.* 163 Mass. 574, 581, and cases cited. *Ginn v. Almy*, 212 Mass. 486. Or he might have chosen to affirm the purchase, to retain the stock, and to sue for the damages sustained by reason of the deceit. *Whiteside v. Brawley*, 152 Mass. 133. *McKinley v. Warren*, 218 Mass. 310. Since he chose the latter course and sued in tort for deceit he is bound by the rule of damages in that form of action. That is to say, he can recover only the difference in value between the stock which in fact he got and the treasury stock which he would have got if the representation made by the defendants had been true. *Thomson v. Pentecost*, 210 Mass. 223. *Kerr v. Shurtleff*, 218 Mass. 167, 173, and cases cited. That principle is applicable on the facts found here, which distinguish the case from *Kilgore v. Bruce*, 166 Mass. 136, cited by the plaintiff. The auditor has found expressly that "the stock of the Boston and Alta Copper Company is, and was, worthless," and that "the stock was equally worthless whether or not the representation of the defendants was true." The exceptions state that "There was no evidence, and it was not contended by the plaintiff, that the value of the stock would be greater or different if it were treasury stock from what it would be if it were not treasury stock." The heavy losses sustained by the corporation and by the defendants themselves indicate that the stock would not have been worth anything even if all the proceeds had gone into the treasury. In any event the general rule of damages would give the plaintiff the benefit of the value which the stock would have if the representation was true. See *Findlater v. Dorland*, 152 Mich. 301. No other misrepresentation was relied upon or established.

It follows that as the plaintiff failed to establish an essential element of his case, namely, that he suffered damage in consequence of the false representation, the trial judge * rightly ordered a verdict for the defendants.

Exceptions overruled.

S. H. Pillsbury, (H. C. Tuttle with him,) for the plaintiff.

H. E. Warner, for the defendants.

VIOLET M. MEGATHLIN vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. March 3, 1915. — April 1, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Actionable Tort. Damages, In tort.

In an action by a woman passenger upon an electric street railway car against the street railway company for personal injuries, there was evidence tending to show that the car in which the plaintiff was was struck "a terrific blow" with "an awful bang" by a street car behind it and was pushed forward into a street car in front, that a woman passenger in front of the plaintiff was thrown by the impact out of the car on her head against a fence and another woman who was passing between the first and second cars was killed, that the plaintiff was thrown sharply forward and back, that she did not know whether she struck anything or not but that it seemed as if she "didn't have" her "head." The plaintiff's physician testified that the next day the plaintiff had an eruption on her neck and the upper portions of her body which, with her other symptoms, he diagnosed as urticaria, and that a collision which resulted in a severe jar and shaking up or shock to the nervous system was an adequate explanation of the plaintiff's condition. *Held*, that a finding for the plaintiff was warranted because there was evidence that the plaintiff at the time of the collision suffered a physical injury from without.

TORT for personal injuries alleged to have been caused by a collision between street cars of the defendant, in one of which the plaintiff was a passenger. Writ dated September 4, 1913.

In the Superior Court the case was heard by Fox, J., without a jury. He found for the plaintiff and with the consent of both

* *Hitchcock, J.*

parties reported the case to this court for determination, the plaintiff having stipulated that, if the judge had no right to find in her favor, judgment was to be for the defendant; otherwise, judgment was to be for the plaintiff in the sum of \$1,000.

J. E. Hannigan, for the defendant.

E. O. Proctor, for the plaintiff.

DE COURCY, J. While the open car in which the plaintiff was a passenger, and another one ahead, were stationary, a third car coming from behind struck the one in which she sat "a terrific blow" and knocked it into the car ahead. A woman seated in front of the plaintiff was thrown out on her head and against a fence; and another woman who was passing between the first and second cars was killed. When asked to state the effect of the collision upon herself the plaintiff said: "There was an awful bang. It threw you back and forward. No sooner forward than back. I don't know whether I struck anything or not. I put my hand up to see if my head was there;" and "It seemed as if you were no sooner forward than you were thrust back; . . . it seemed as if I didn't have my head, . . . I kept putting my hands up like this [indicating] . . . because I felt as if my head wasn't there." To the question "What did you feel, any effects from the collision?" she answered, "Why, yes, I felt terribly weak." On the next day she was nervous and unstrung, and there was an eruption over her neck and the upper portions of her body. This was diagnosed as urticaria by her physician, who testified that a collision which results in a severe jar and shaking up or shock to the nervous system was an adequate explanation of the plaintiff's condition. No other injury to the plaintiff was testified to. The trial judge found that the plaintiff made out a case of physical injury such as entitled her to damages; and the only question raised by the report is whether he was warranted by the evidence in so finding.

On this narrow issue of the proof of physical injury the evidence is meagre. But we cannot say as matter of law that the plaintiff's sensation that her head was gone, and her extreme weakness, following the violent motion of being jerked forward and back, were due solely to internal fright and were not evidence of physical injury. As was said by Hammond, J., in *Driscoll v. Gaffey*, 207 Mass. 102, 105: "It is not necessary that the physical injury

from without should be indicated upon the surface of the body by a bruise or otherwise. . . . An internal injury caused by a blow from without is none the less an injury from the fact that it is wholly internal, or indeed from the fact that its true nature cannot be accurately diagnosed except by a *post mortem* examination." Further, on the testimony of the plaintiff's physician, the judge could find that the urticaria from which the plaintiff suffered was due in part at least to the physical effects of the severe jar; and there was evidence that it did not result from nervous shock. Presumably the plaintiff suffered from fright and mental disturbance, but we think that the judge properly could find that it was accompanied, as a result of the same accident, by physical injury "from without." *Berard v. Boston & Albany Railroad*, 177 Mass. 179. *Steverman v. Boston Elevated Railway*, 205 Mass. 508. *Bell v. New York, New Haven, & Hartford Railroad*, 217 Mass. 408.

It also is argued by the plaintiff that without showing an explicit physical injury she may recover on the ground that she has shown a substantial battery or impact, guaranteeing the reality of the nervous shock. That question, however, is not open on the record. In accordance with the report judgment is to be entered for the plaintiff in the sum of \$1,000.

So ordered.

THOMAS W. LETCHWORTH *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. March 4, 1915. — April 1, 1915.

Present: RUGG, C. J., BRALEY, DE COUCEY, PIERCE, & CARROLL, JJ.

Negligence, Employer's liability, Railroad, Invited person, Walk on drawbridge in railroad yard, Assumption of risk. *Practice*, Civil, Exceptions. *Pleading*, Civil, Answer. *Evidence*.

At the trial of an action against a railroad company by one of its locomotive engineers to recover for personal injuries received when at eleven o'clock at night the plaintiff, in walking to the defendant's passenger station from the engine house to take a train to his home at the close of his work and in crossing a drawbridge over a river in the defendant's yard, fell through the bridge because of the lack of a plank walk that ordinarily was there, if there is evidence that the

bridge consisted of trusses on which rails were laid, that plank walks had been laid along some of the tracks on the drawbridge which had been maintained for years by the defendant for the use of its employees and were the only means furnished for passing on the defendant's premises from one side to the other of the river, that the walk that the plaintiff was attempting to use was the usual and ordinary way travelled both day and night by engineers and firemen leaving the engine house to take trains to their homes at the passenger station, that the plaintiff had seen other engineers so use it and his superior officer walk upon it and never had been forbidden to use it, a finding is warranted that he was using the walk by an implied invitation of the defendant.

Under the foregoing circumstances, further evidence tending to show that the defendant in repairing the bridge had taken up the walk and had not replaced it and had given no warning of its absence by signal, notice or otherwise, warrants a finding of negligence on the part of the defendant whether or not it is found that, when injured, the plaintiff's employment for the time had ceased.

And where it further appears that to get to the station by the only other route would have resulted in the loss of over an hour's time for the plaintiff, that in approaching the bridge he was looking at the signals in the yard to avoid being run into by trains, and that he had no cause to know that the planking of the walk on the bridge was up, a finding that the plaintiff was in the exercise of due care is warranted.

In an action of tort for personal injuries the defendant, in order to rely on the defence that the plaintiff assumed the risk of the injury, must set it up affirmatively in his answer.

In an action of tort for personal injuries, it cannot be ruled as a matter of law that the plaintiff assumed the risk of the injury, if there is evidence upon which a finding would be warranted that the plaintiff was ignorant of the existence of the risk.

It was said in this case that an exception to the charge of the judge to the jury "so far as is inconsistent with the rulings requested" by the excepting party well might be dismissed as too indefinite. The charge in this case was unobjectionable.

An exception to a statement by a medical expert for the plaintiff at the trial of an action of tort for personal injuries, that one of his assistants had applied a certain physical test to the plaintiff, will not be sustained, although the evidence was immaterial, if later in the trial the defendant introduced the result of the test, because the defendant was not harmed by the error.

TORT for personal injuries received by the plaintiff, a locomotive engineer employed by the defendant, as he was leaving his work on his way home and was crossing a drawbridge, as stated in the opinion. Writ dated April 24, 1912.

In the Superior Court the case was tried before *Stevens, J.*

The case was submitted to the jury upon the first and third counts of the declaration, both of which were at common law, the first count alleging that the plaintiff was an employee of the defendant and received his injury because of negligence of the

defendant in failing to furnish safe and proper approaches and ways to be used by the plaintiff during his work, and the third count alleging merely that the plaintiff, while rightfully and lawfully upon premises of the defendant, was injured by reason of a negligently unsafe condition of the premises.

There was evidence in behalf of the defendant on the question of damages that blindness, from which the plaintiff was suffering and which the plaintiff's evidence tended to show was due to his injuries, was due to atrophy of the nerves of the eyes which had begun months before the time that the injuries complained of were received and was not due to injuries, but was the result of syphilis; and that the "Wasserman test," so called, is a test commonly made to detect the germs of syphilis. Dr. Frank C. Richardson, a medical expert and specialist in nerve diseases, testifying for the plaintiff, stated that he had examined the condition of the plaintiff's eyes as to vision and had found that his vision was wholly lost and that in his opinion the plaintiff was suffering from blindness due to primary atrophy. He also testified in direct examination subject to exceptions by the defendant that one of his assistants had applied the Wasserman test to the plaintiff, and that the test was reported to him. There was no evidence that Dr. Richardson was present at the time the test was made.

Later in the trial as a part of the evidence of the defendant the record of the hospital giving the result of this Wasserman test was offered by the defendant and was read to the jury. The test of the blood showed a negative reaction and the spinal fluid a positive reaction.

Other material evidence is described in the bill of exceptions.

At the close of the evidence the defendant asked for rulings that the evidence did not justify a verdict for the plaintiff on either of the counts submitted to the jury, and for the following rulings:

"3. There is not sufficient evidence to justify a finding that the plaintiff was using this way on the invitation of the defendant.

"4. There is not sufficient evidence to justify a finding that the defendant was negligent.

"5. If the jury find that the relation of master and servant existed at the time of the accident they should return a verdict for the defendant.

"6. The evidence of the employment of the plaintiff on the day of the accident and at the time of the accident does not justify a verdict for the plaintiff.

"7. If the jury find by the evidence of the plaintiff that he was an employee of the defendant at the time of the accident he cannot recover.

"8. If the plaintiff is found to be still in the employment of the defendant at the time of the accident he had assumed the risk of the footbridge not being in place and he cannot recover.

"9. There is no evidence that the footbridges over No. 1 draw were constructed for any purpose other than to make this particular part of the railroad yard convenient to a degree approximating to the convenience of the rest of the railroad yard for the business of the defendant, and no invitation to employees can be implied to use this bridge on their way to or from their work when their work is begun and finished at the East Cambridge roundhouse."

The rulings were refused. There was a verdict for the plaintiff in the sum of \$17,050; and the defendant alleged exceptions.

F. N. Wier, (J. M. O'Donoghue with him,) for the defendant.

W. I. Badger, (C. M. Pratt with him,) for the plaintiff.

DE COURCY, J. The plaintiff was a locomotive engineer in the employ of the defendant. At about eleven o'clock, P. M., on April 24, 1911, after putting up his engine at the round house in East Cambridge, he proceeded to walk to the North Station, over the location of the railroad, to take a train for his home. He reached the drawbridge over the Charles River, maintained by the defendant as a part of its location, and was in the act of stepping to where there always had been a plank walk across the bridge, when he found the planking gone. Unable to save himself from falling he went through the open work of the bridge into the river.

1. There was evidence for the jury of an implied invitation to the plaintiff to use this plank walk or so called foot bridge. The drawbridge consisted of trusses on which the rails were laid. The remaining portion of the bridge was open, except where plank walks, eighteen inches to two feet in width, were placed along by tracks 2, 4 and 6. These foot bridges had been maintained for years by the defendant for the use of its employees, and were the only means furnished for passing from one side of the river to the

other on the defendant's premises. They necessarily were used by many of the employees in the course of their daily work. There was evidence that this foot bridge at No. 6 track, where the plaintiff was injured, was the usual and ordinary way travelled both day and night by engineers and firemen in going from the engine house to the North Station, when they wanted to take a train; that the plaintiff had seen other engineers ordinarily avail themselves of it in going to and from their work; that he had seen his superior officers walk upon it, and that he never had been told not to use it. *Hanlon v. Thompson*, 167 Mass. 190. *Boyle v. Columbian Fireproofing Co.* 182 Mass. 93. *Feneff v. Boston & Maine Railroad*, 196 Mass. 575, 577. *Donovan's Case*, 217 Mass. 76.

2. The defendant concedes that there was evidence from which the jury could find that the plank walk along by track No. 6 was not in place at the time when the plaintiff was injured. It seems that the defendant recently had taken it up while replacing the wooden trusses of the bridge with steel ones. No warning of the removal of this foot bridge was given to the plaintiff by signal, notice or otherwise. In view of the frequent use of this way by employees, by night as well as by day, plainly this failure to warn could be found to be negligent. *Gustafsen v. Washburn & Moen Manuf. Co.* 153 Mass. 468. *Falardeau v. Hoar*, 192 Mass. 263. *Flaherty v. New York Central & Hudson River Railroad*, 211 Mass. 570. *Foley v. J. R. Whipple Co.* 214 Mass. 499.

3. As to the plaintiff's due care. It could not be said as matter of law that he was careless in choosing to go over the railroad location in order to go home by train rather than wait an hour for a street car by way of East Street. Having decided to go by way of the railroad yard, where trains were likely to pass, and over a dangerous, unfloored drawbridge, in the dark, it was his duty to exercise vigilance commensurate with his surroundings. He testified that in going toward the drawbridge he was looking at the signals, and also in the direction of the station, to see that no train was approaching in either direction; that he stopped and saw that track 6 was clear before he started to cross the drawbridge; and that he had no cause to know that the planks had been removed. The defendant argues with force that his failure to discover the absence of the plank walk before proceeding to

step upon the dangerous drawbridge was so careless as to preclude his recovery. On the whole evidence, however, we think that this was a question of fact for the jury. In the absence of a warning the plaintiff had a right to rely somewhat on the assumption that the foot bridge, which was in constant use, had not been removed. The jury viewed the scene of the accident, and apparently accepted the evidence most favorable to the plaintiff. *Woods v. Boston*, 121 Mass. 337. *Urquhart v. Smith & Anthony Co.* 192 Mass. 257. *Marston v. Reynolds*, 211 Mass. 590.

4. What we have said disposes of all the requests for rulings except the eighth. As to that it is enough to say that the defence of assumption of risk was not set up in the answer. Aside from the matter of pleading, it could not be ruled that the plaintiff assumed the risk of the danger when he was ignorant of its existence. The exception to the charge "so far as is inconsistent with the rulings requested" well might be dismissed as too indefinite; nevertheless the charge was unobjectionable. The testimony of Dr. Richardson, that a Wasserman test had been made by one of his assistants, was immaterial. But as the result of this very test was introduced by the defendant later, no harmful error is shown.

Exceptions overruled.

FREDERICK REED vs. LILLIAN S. MAYO & another.

Norfolk. March 4, 1915. — April 1, 1915.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Way, Public: ancient public way, Laying out. *Evidence*, Admission by deed, Ancient records, Presumptions and burden of proof.

At the trial of a petition for the registration of the title to certain land, a question at issue was, whether one side of the land was bounded by the end of a public way. There was evidence that in 1852 a vote of a meeting of the town in which the land was situated had referred to the selectmen an article relating to the laying out of a new road over the location of the way in question, that at a town meeting held about a month later, under an article in the warrant "to hear the report of any committee that may be ready to do the same," the selectmen reported recommending the laying out and stating that the owner of the

land through which the way ran, the predecessor in title of the respondent, had agreed to give land for the way, to fence it and to construct the way to the satisfaction of the selectmen for \$150; that the report of the selectmen was "accepted;" that since that time the way had been used by the public, that the town continuously had made repairs and had done work upon it under a claim that it was a public way, and that, throughout the respondent's chain of title and in two mortgages which the respondent had given, the way had been referred to as a town way. *Held*, that a finding that the way was an ancient public way was warranted.

Even though, in the records of town meetings in 1852, recording the reference to the selectmen of a petition for the laying out of a town way, a report of the selectmen on the subject at a subsequent town meeting and a vote "to accept" the report, there is no record that the laying out with boundaries and measurements had been filed with the town clerk seven days before the meeting as required by Rev. Sts. c. 24, § 69, it may be presumed or inferred after sixty years, especially where it appears that the only owner of land through which the way was to pass was a petitioner for its laying out, that the statutory requirement was complied with.

PETITION, filed in the Land Court on February 13, 1913, for the registration of the title to certain land in Wellesley, described in the petition as bounded "easterly by the westerly end of a town highway." The respondent, who owned land on both sides of the alleged town highway, denied that it was a town highway and that the petitioner had any rights of way appurtenant to his land.

The case was heard by *Davis, J.* The material portions of the evidence at the hearing before him are described in the opinion. He found that the laying out of the way in question by the town in 1852 was legal and that the petitioner correctly described his land as bounding on the westerly end of such town way; and, taking into consideration that action of the town and the other evidence recited in the opinion, he also found that the road was an ancient public way, ordered a decree for the petitioner and, at the request of the parties, reported the case for determination by this court.

The case was submitted on briefs.

H. S. Avery, for the respondent.

H. C. Mulligan, for the petitioner.

DE COURCY, J. A portion of the easterly line of the petitioner's tract is described as bounded "by the western end of a town highway leading to Weston Road." The judge of the Land Court, on the facts found by him, ruled that the way referred to (known as Mayo Road) was a town road, and ordered a decree accordingly.

This way had its beginning more than sixty years ago, when it appears that one James Roy, the respondent's predecessor in title, agreed to give the land therefor, to fence it and to make the road to the acceptance of the selectmen, for \$150. Certain proceedings on the subject of laying out the way in question took place at town meetings held in April and May, 1852. Since that time, according to the findings of the Land Court, Mayo Road has been used by the public, and the town has made repairs continuously and has done other work on the road, under a claim by its officers that this was a public way. Further, throughout the respondent's own chain of title, including the immediate deed to her and mortgages given by her, it has been mentioned as a town road running through her land. On these facts, unaided by the effect of the town meeting records, we should be inclined to say that the Land Court was warranted in finding that this ancient way was a town way. The admissions of the respondent and of her predecessor in title tend to prove the existence of such a way. *Osgood v. Coates*, 1 Allen, 77. *Blake v. Everett*, 1 Allen, 248. *Simpson v. Dix*, 131 Mass. 179. See *Driscoll v. Smith*, 184 Mass. 221. The making of repairs by the town is evidence of the existence of a way located and appropriated to the public use. *Commonwealth v. Holliston*, 107 Mass. 232. *Commonwealth v. Matthews*, 122 Mass. 60. And it well may be that the uninterrupted adverse use of Mayo Road since 1852 was enough to establish a way by prescription. *Bassett v. Harwich*, 180 Mass. 585.

The town records show that the warrant for a town meeting to be held on April 5, 1852, contained an article "to see if the town will discontinue a part of the old road leading from the Parker place to the Methodist Meeting House in West Needham. Also to lay out a new road about forty-seven rods long running northeasterly from land of Ephraim Loker and James Roy to the new road on Pine Plain, so called, agreeably to the petition of James Roy and others." At the town meeting it was voted to refer this article to the selectmen. At a town meeting held on May 3, 1852, and apparently under the article * in the warrant referring to "the

* This article read: "To hear the report of any committees that may be ready to do the same."

report of any committees," the selectmen made a report,* recommending the discontinuance of the old road and the laying out of the road in question; and the town voted to accept it. The article in the warrant for the May meeting did not explicitly state that the report of the selectmen respecting the location of a new road was to be acted upon. See Rev. Sts. c. 15, § 21, then in force. But it is evident that the subject of laying out Mayo Road was carried over from the April to the May meeting, and that the report of the selectmen was regarded as the report of a "committee," within the meaning of the May warrant. *Alden v. Rounseville*, 7 Met. 218. *Fuller v. Groton*, 11 Gray, 340. *Geer v. Fleming*, 110 Mass. 39. It is urged that so far as the record shows, the laying out, with the boundaries and measurements of the way, had not been filed in the office of the town clerk seven days before the meeting, as then required by Rev. Sts. c. 24, § 69. It does not necessarily follow, however, that the provisions of the statute were not complied with. The main purpose of giving seven days' notice of the intention to lay out the way was to inform the landowner as to what portion of his land was to be taken. See *Jeffries v. Swampscott*, 105 Mass. 535. In this instance the only owner interested was James Roy, who had petitioned the town to lay out Mayo Road and had given the land needed for that purpose. Even though evidence of notice and filing does not appear in the town records, it may be presumed or inferred after sixty years that the statutory requirement was complied with. All reasonable presumptions are to be taken in favor of such ancient records.

In view of all the facts, — the records, the construction of the road and its long user, the occasional repairs, and other circumstances tending to show that Mayo Road originally was laid out as a town way, — we cannot say that the judge of the Land Court was wrong in finding that it is an ancient public way. *Commonwealth v. Belding*, 13 Met. 10. *Avery v. Stewart*, 1 Cush. 496. *Holyoke v. Hadley Co.* 174 Mass. 424. And see *Harrington v. Harrington*, 1 Met. 404.

* In this report it was stated that "said Roy [who had petitioned for the laying out] agrees to give the land and fence it and make the road to the acceptance of the selectmen for \$150."

In accordance with the report a decree is to be entered for the petitioner.

Ordered accordingly.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY
& another vs. COUNTY COMMISSIONERS OF MIDDLESEX.

Middlesex. March 9, 1915. — April 1, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

County Commissioners. Railroad, Obstruction of public way. Way, Public. Words, "Repairs," "Alteration."

Where, on a petition of the selectmen of a town to county commissioners under R. L. c. 111, § 132, seeking an order that an alleged obstruction of a public way at a point where a railroad passed beneath it be stopped, the commissioners found that a fence on the easterly side of the way was a monument fixing that boundary, that there were old walls and fences at various places along the way that showed that it always had been two rods wide, that witnesses who had known the way before the railroad was built testified that it did not narrow at the place where the railroad afterwards crossed, and that there were records of a widening and straightening of the way in 1847 and a railroad location plan filed in 1848 which showed the way to be of a uniform width of two rods, a determination by the commissioners that a fence constructed by the railroad company in 1882 twelve feet within the westerly boundary of the way was an obstruction to the way is not contrary to the provision of R. L. c. 53, § 1, discloses no error of law and is conclusive.

A narrowing by a railroad company of a public highway two rods in width by the construction and maintenance of a fence twelve feet within one of its side lines at a point where the railroad passes under the way may be found to constitute an obstruction of the way, the existence of which it was exclusively within the province of the county commissioners to determine in proceedings under R. L. c. 111, § 132.

Where, on a petition by the selectmen of a town to the county commissioners alleging that a fence maintained by a railroad company within the limits of a public way at a point where the railroad passes beneath the way is an obstruction and praying that the way be restored to its proper width, the commissioners find that the way is two rods in width and that the obstruction exists, narrowing the way, and order that the roadway at the crossing be graded two rods in width, that guard rails be erected at the sides, that twenty-two feet be constructed as a roadway and five and a half feet on each side be reserved for sidewalk purposes, that the sidewalk on one side be constructed, and that the railroad corporation pay the costs of the application and of the repairs, such order is an order for "repairs" under R. L. c. 111, § 132, and cannot be said to be an order for an "alteration" under § 134.

PETITION, filed on May 31, 1907, for a writ of certiorari to quash proceedings of the county commissioners of Middlesex County (hereinafter called the county commissioners) directing the petitioner New York Central and Hudson River Railroad Company (hereinafter called the petitioner) to restore Highland Street in Holliston to its original width of thirty-three feet at a point where the petitioner's railroad passed under the street.

It appeared that on October 30, 1905, the selectmen of Holliston filed a petition with the county commissioners alleging that by the construction of the railroad in question in 1847 Highland Street was made narrower at the point at which the railroad passes under the street, that the railroad maintained a fence along the westerly side of the public way twelve feet or thereabouts from the westerly boundary of the public way, and that such fence was a danger and menace to the public and was an obstruction of which the selectmen complained; and praying that the New York Central and Hudson River Railroad Company be ordered "to restore said public way to its proper width at the point complained of and that all costs of such restoration be assessed to the said railroad."

The county commissioners in their decree found the following facts: Highland Street, which existed as a public way before the construction of the railroad in the year 1847, was two rods wide at the place where the railroad crossed it. The railroad company in 1847 constructed its railroad across the street so as to pass under it "at a height of about forty feet under said way," necessitating by reason of methods employed a wide excavation some one hundred and fifty feet in width at the top of the excavation and narrowing at the bottom to a space sufficient for its track. A structure of masonry was built in the form of an arch about one hundred feet in length and high enough for the operation of the railroad therein, and the earth was replaced over the masonry arch up to the height of the original way and the surface of the way made passable for a width of about twenty-four feet with guard rails at the top of the slopes, "said twenty-four feet being the width of the top of the embankment." The width at the narrowest part of the present roadway at the crossing is less than twenty-one feet, the guard rails or fences having been moved toward the centre of the roadway about three feet owing to the washing away of the banks.

The commissioners further found "that no decree was obtained at the time of making the alterations in the way; that the construction of said crossing as carried out was unauthorized; that the way by reason of the unauthorized work performed was narrowed, and is now some twelve feet narrower than the original way; that it appears that the railroad does not cross the public way so as not to obstruct it; that the construction and operation of said railroad as carried out and maintained constitutes an unlawful obstruction of said way, and has been and is an unnecessary interference with the public travel thereon; that no decree was obtained permitting the narrowing of said way." The commissioners therefore made "a decree prescribing what repairs shall be made by the corporation at the crossing, the time within which they shall be made, and do now order the corporation to pay the costs of the application and of said repairs."

The decree was as follows: "The roadway over the crossing of the location of the said railroad shall be graded to the lines shown in red upon the above mentioned plan at the height of the present roadway, and the guard rails erected so as to give thirty-three feet in width across said railroad location. Twenty-two feet in width thereof in the centre shall be a roadway properly crowned, drained and graded, and five and one half feet on each side is to be reserved for sidewalk purposes, with the sidewalk actually constructed on the southwesterly side.

"And the said corporation shall build such retaining walls or other structures as are necessary to maintain the slopes at an angle thirty-three and one half degrees with the horizon.

"The repairs shall be completed before June 1, 1906."

Evidence upon which some of the findings were made is stated in the opinion.

On July 15, 1906, the selectmen of Holliston brought a bill in equity against the railroad company seeking specific performance of the decree of the county commissioners. A decree of a single justice dismissing the bill was reversed by this court by a decision reported in 195 Mass. 299 and specific performance was ordered. Thereafter this petition was brought.

The case was reserved by *Carroll, J.*, for determination by this court.

R. A. Stewart, for the petitioners.

G. L. Mayberry, for the respondents.

DE COURCY, J. This is a petition for a writ of certiorari to quash certain proceedings of the board of county commissioners. The Milford branch of the Boston and Albany Railroad, now leased to the New York Central and Hudson River Railroad Company, passes under Highland Street, a public way in the town of Holliston. The selectmen of Holliston brought a petition under R. L. c. 111, § 132, alleging that the railroad so crossed Highland Street as to narrow and obstruct it. The county commissioners, after due notice and hearing, made certain findings and ordered the petitioner to make specified repairs at the crossing, restoring Highland Street within the railroad location to the width of thirty-three feet.

The petitioner contends that the record of the proceedings of the county commissioners discloses an error of law in their determination that the fence erected on the westerly side of Highland Street is an obstruction of the way. This objection is based mainly on the argument that the fence had stood so long that the commissioners were bound to adopt it as the true westerly boundary of the way by virtue of R. L. c. 53, § 1. The commissioners have found that it was constructed within forty years, namely in 1882. Hence they were not compelled to take it as the true limit of the way unless "the boundaries thereof are not known and cannot be made certain by the records or by monuments." They set forth in their answer the following facts, among others, on which they found that the way had been narrowed, namely: That the fence on the easterly side of the street constituted one monument which fixed the easterly boundary; that there were old walls and fences at various points along both lines of Highland Street which indicated that this ancient road always had been two rods wide; that witnesses who had known the road at a time before the railroad was built testified that then there had been no narrowing of the road at the point where the railroad afterwards crossed; that records were presented to them showing a widening and straightening of portions of the road July 17, 1847, the effect of which was to make those portions correspond to the two rods' width of the rest of the road; and that the railroad location plan, filed January 3, 1848, showed the street to be of uniform width. It does not appear that objection was made to

the competency of any of the evidence admitted by the commissioners, nor were they asked to certify the evidence upon which they made their findings of fact. As the case stands, their finding that the way is now some twelve feet narrower than the original way is conclusive. *Wood v. Quincy*, 11 Cush. 487. *Commonwealth v. Old Colony & Fall River Railroad*, 14 Gray, 93. *Tewksbury v. County Commissioners*, 117 Mass. 563. *Ward v. Aldermen of Newton*, 181 Mass. 432. *Banaghan v. County Commissioners*, 213 Mass. 17.

Such a narrowing of the street, and the maintenance of a fence within its true limits, well may be found to constitute an obstruction of the way, by rendering it inconvenient for travel. And it was exclusively within the province of the commissioners to determine the fact that an obstruction existed, and that it was due to the encroachments of the petitioner. *Selectmen of Holliston v. New York Central & Hudson River Railroad*, 195 Mass. 299, 305. In this connection it is to be remembered that the obligation not to obstruct a highway, created by R. L. c. 111, § 124 (formerly Rev. Sts. c. 39, § 66), is a continuing one. Even if no sanction or approval of the county commissioners or of the town authorities was required when this crossing was constructed, and its original construction was valid (see St. 1846, c. 271, § 1), nevertheless, if the crossing later became an obstruction, proceedings could be brought to require the making of changes. *Dickinson v. New Haven & Northampton Co.* 155 Mass. 16. *Selectmen of Holliston v. New York Central & Hudson River Railroad*, 195 Mass. 299, 304.

It is further contended that the work prescribed by the decree of the county commissioners is an alteration, rather than repairs, and that as matter of law the cost cannot be placed wholly upon the petitioner. This objection apparently was disposed of in the equity suit (195 Mass. 299), wherein the court said at page 306: "The decree being sufficiently full and exact, and the board not having exceeded their jurisdiction, no sufficient reason is shown why specific performance should not be decreed." And even regardless of the effect of that decision, we cannot say as matter of law that the work at the crossing prescribed in the decree of the county commissioners was an alteration and not "repairs" within the scope of R. L. c. 111, § 132, — the cost of which must be borne by the railroad corporation. The question does not

involve the distinction between general and specific repairs (see *Sullivan v. Fall River*, 144 Mass. 579), but between "repairs" under § 132 and an "alteration" under § 134. The term "alteration" is used technically in the legislation upon the subject of highways as indicating a change of location in an intermediate section of an existing way, the establishment of a new section in substitution of a part of the old way. As was said in *Bigelow v. Worcester*, 169 Mass. 390, 393, "A technical alteration is the substitution of one way for another." To the same effect see *Bliss v. Deerfield*, 13 Pick. 102, 106; *Gloucester v. County Commissioners*, 3 Met. 375, 379; *Goodwin v. Marblehead*, 1 Allen, 37; *Johnson v. Wyman*, 9 Gray, 186, 189. Without attempting to lay down a general definition of these words as used in the statute which would be applicable to all cases that may arise, we are of opinion that the work here ordered by the commissioners was not an "alteration." It called for no change in the course or limits of the original location of Highland Street. It prescribed repairs within the highway location that presumably were reasonably adapted to prevent an unnecessary interference with public travel over the crossing. *Selectmen of Westborough, petitioner*, 169 Mass. 495.

The case of *Nichols v. Boston & Maine Railroad*, 174 Mass. 379, relied on by the petitioner, involved an order for alterations and not repairs. The petition of the selectmen to the county commissioners set forth a case under Pub. Sts. c. 112, § 129 (now R. L. c. 111, § 134), and asked for relief under that section; and the decree of the commissioners ordered certain "alterations" to be made at the expense of the railroad company.

Petition dismissed.

HOWARD D. MACGINNIS vs. MARLBOROUGH-HUDSON GAS
COMPANY.

Middlesex. March 9, 1915. — April 1, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Gas Company. Actionable Tort. Damages, For property taken or impaired under statutory authority.

A gas company upon receiving permission from the board of mayor and aldermen of a city to dig a trench in a public way and to lay a pipe therein, is authorized to make use of the street under a public right and if in digging the trench the company's contractor without negligence blasts a ledge which permits water collected in a surface depression on land near the way to flow into the cellar of the owner of other adjoining land, the company has violated no common law right of such owner and is not liable to him in an action of tort for alleged negligence.

Whether the provision of R. L. c. 110, § 76, that the permission given by the board of mayor and aldermen of a city to certain corporations for the digging of trenches and the laying of pipes in highways shall "not affect the right or remedy to recover damages for an injury caused to persons or property by the acts of such corporations," was designed to give to a landowner a cause of action where none existed at common law and to afford compensation for damage necessarily caused by work which is authorized by the statute and is executed in a reasonably proper manner, was not decided in this case, which was an action of tort for alleged negligence.

TORT at common law for damages resulting from the flowing of water into the plaintiff's cellar because of the removal of a ledge by the defendant in blasting for the digging of a trench and the laying of its pipes on Maple Street in Marlborough. Writ dated July 17, 1913.

The case was tried before *Stevens, J.* The following statement of the case is taken from the opinion of the court.

The plaintiff's house was on the easterly side of Maple Street, and about five feet from the street line. On the opposite side of the street, and about two hundred feet in a northwesterly direction from this house, was a natural depression of the ground. Here the surface water from the surrounding territory collected at certain times of the year and formed a pool or pond that was about one hundred feet long, thirty feet wide and two feet deep. The bottom of the pond was always moist and muddy and never was cultivated. All the water that did not overflow into the

gutter on the westerly side of Maple Street remained in the pond until it either evaporated or seeped into the ground, joining the ground water.

The defendant, under a license duly issued by the city, opened a trench three and one half feet deep the whole length of Maple Street and about ten feet from the easterly line of the street, for the purpose of laying a line of gas pipe. In connection with this work the contractor employed by the defendant blasted a ledge which extended from a few feet north of the plaintiff's house in a southwesterly direction across the street. When the frost in the ground began to thaw in the last days of March, 1913, — which was about two months after the gas pipe was laid, — and soon after the contractor had used a steam roller on the surface, water in considerable quantities began to percolate into the plaintiff's cellar through and under the wall. The city pumped it out daily for twenty-six days, during which time the water in the pond gradually receded. The jury specially found that the plaintiff's cellar was flooded because the ledge was blown out in the trench near the plaintiff's house; and also found that the work on the trench was not done negligently. Upon the return of the answers of the jury to the special questions, the judge ordered a verdict for the defendant and reported the case for determination by this court upon a stipulation of the parties that, if the ordering of the verdict was wrong, judgment should be entered for the plaintiff in the sum of \$612.50 with costs; otherwise, judgment should be entered on the verdict.

J. J. Shaughnessy, for the plaintiff.

F. D. Putnam, for the defendant.

DE COURCY, J. [After the foregoing statement of the case.] The easement in an existing highway permits public uses on and beneath the surface of the way of a far reaching and ever increasing character. Pipes, sewers and subways impose no additional servitude upon the land in the public street for which the owner of the fee can claim damages. *Cheney v. Barker*, 198 Mass. 356. *Sears v. Crocker*, 184 Mass. 586. *Bishop v. North Adams Fire District*, 167 Mass. 364. *Lincoln v. Commonwealth*, 164 Mass. 1. As the appropriation of the space below the surface is not an invasion of his common law rights, the abutter cannot maintain an action of tort for an injury caused thereby, unless the construc-

tion work is done negligently or improperly. A common instance of this is where the work necessarily causes surface water to flow, or underground water to percolate, upon the land of an abutter. *Kennison v. Beverly*, 146 Mass. 467. *Barry v. Lowell*, 8 Allen, 127. *Flagg v. Worcester*, 13 Gray, 601. *Holleran v. Boston*, 176 Mass. 75. And see "Ways and Waters in Massachusetts," 28 Harv. Law Rev. 478. It is not disputed here that the municipality duly gave consent to the defendant to lay the gas pipes in Maple Street, and that the location of the trench was designated by the superintendent of streets under the terms of the vote of the board of mayor and aldermen. The defendant was thereby authorized to make use of the street under the public right. R. L. c. 110, § 76. *Pierce v. Drew*, 136 Mass. 75, 81. *Lincoln v. Commonwealth*, 164 Mass. 1, 10.

On the facts shown the defendant has violated no common law right of the plaintiff. In many instances where there is no recovery at common law the Legislature has provided indemnity for injury suffered by abutters and others. Thus compensation is recoverable under the highway statute for injury caused by surface water flowing upon an abutter's land by reason of raising the grade of a street. R. L. c. 51, § 15. *Woodbury v. Beverly*, 153 Mass. 245. Under the grade crossing act (R. L. c. 111, § 153, St. 1906, c. 463, Part I, § 37), remedy is given for acts which cause injury of a special and peculiar kind, although they are not a violation of common law rights. *Hyde v. Fall River*, 189 Mass. 439. A town constructing a sewer in land taken for that purpose is liable under R. L. c. 49, § 2, for draining a well on land not adjoining the land taken, although at common law the owner of land lawfully may make excavations in it and thereby drain his neighbor's well. *Trowbridge v. Brookline*, 144 Mass. 139. *Davis v. Spaulding*, 157 Mass. 431. And under the East Boston Tunnel statute, (St. 1894, c. 548, § 34, as amended by St. 1895, c. 440, § 1,) the owner of abutting land whose cellar was flooded owing to the unauthorized removal of a bulkhead was held entitled to compensation. *Fifty Associates v. Boston*, 201 Mass. 585. See also *Peabody v. Boston*, ante, 376.

R. L. c. 110, § 76, which authorizes gas light companies to open the streets for the purpose of laying pipes, with the consent in writing of the mayor and aldermen, provides that "such consent

shall not affect the right or remedy to recover damages for an injury caused to persons or property by the acts of such corporations." We do not undertake to pass upon the question whether this provision was designed to give the plaintiff a cause of action where none existed at common law, and to afford compensation for damage necessarily caused by work which was authorized by the statute and was executed in a reasonably proper manner. The present action is one of tort for alleged negligence. The jury specially found that the work on the trench was not done negligently; hence no case of liability at common law was made out, — even assuming that an action of tort would lie for negligent acts done in carrying out the purposes of the statute. See *Wescott v. Boston*, 186 Mass. 540. We cannot say that the judge was wrong in directing a verdict for the defendant; and under the terms of the report, based on the stipulation of the parties, the entry must be

Judgment for the defendant.

TIMOTHY J. O'BRIEN vs. JAMES W. CADOGAN & others.

MICHAEL J. MOYNIHAN vs. SAME.

Suffolk. March 9, 1915. — April 1, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Lawrence. Police. Civil Service.

A letter written and signed by the director of public safety of the city of Lawrence addressed to and served upon a sergeant of police of that city under authority of the provision of the city charter contained in St. 1911, c. 621, Part II, § 43, dated and delivered on January 5, 1914, and stating "I hereby notify you that I have reduced you in rank from sergeant to patrolman. . . . You will report for duty as patrolman . . . at 8 A. M. January 7th, 1914. This order will take effect January 7th, 1914," fairly may be construed to mean that the writer has decided on January 5 to reduce the rank of the officer and that the decision will take effect on January 7.

If a sergeant of police of the city of Lawrence, who is reduced to the rank of patrolman by the director of public safety of that city under authority of the provision of the city charter contained in St. 1911, c. 621, Part II, § 43, for the reason stated in writing that there are too many sergeants on the police force, is entitled to a notice under the provisions of the civil service law contained in Sts. 1904, c. 314, § 2; 1906, c. 210, a notice of two days is a reasonable one which can be found to have afforded him ample time to ask for a public hearing.

TWO PETITIONS, filed on April 11, 1914, each by a police officer of the city of Lawrence for a writ of mandamus addressed to the director of the department of public safety of that city and to its mayor and the members of its city council, commanding them to reinstate the petitioner as a sergeant of police.

The cases were consolidated and were submitted together to *Hammond, J.*, upon an agreed statement of facts, including the facts that are stated in the opinion. The justice in each of the cases made a memorandum of decision as follows:

"I think there was a substantial compliance with the law, even if, as contended by the petitioner, the provisions of St. 1904, c. 314, § 2, are applicable.

"The notice was dated January 5, 1914, and served on the petitioner the same day, and the order of reduction was not to take effect until January 7, 1914. Notwithstanding the language 'I have reduced you' &c. I think under these circumstances the fair construction of the order is that the writer has decided to reduce the rank of the officer, and that that decision will take effect January 7.

"As an inference from the above, I find that if the officer desired a hearing he had ample time in which to ask for it before the order took effect."

The letters addressed to the two petitioners were identical except in the names of the respective petitioners. The one addressed to the petitioner O'Brien was as follows:

"City of Lawrence, Massachusetts, Police Department,
City Marshal's Office.

Lawrence, Mass., January 5, 1914.

Mr. Timothy O'Brien,

Dear Sir: I hereby notify you that I have reduced you in rank from Sergeant to Patrolman for the reason that there are too many Sergeants now acting for the force employed and your services are not necessary.

You will report for duty as patrolman to Assistant Marshal Samuel C. Logan at 8 A. M. January 7th, 1914.

This order will take effect January 7th, 1914.

James W. Cadogan,
Director of Department of Public Safety."

There was a return of a constable dated January 5, 1914, stating that at one o'clock P. M. on that day, he had served notice of the above letter on the petitioner O'Brien by giving him in hand the original. There was a similar return as to the service of the other letter.

The single justice was of opinion that the petitions should be dismissed, and so ordered. At the request of the petitioners he reported the cases for determination by the full court.

The cases were submitted on briefs.

A. S. Apsey, for the petitioners.

D. J. Murphy, for the respondents.

DE COURCY, J. The petitioner in each of these cases is a police officer of the city of Lawrence, and on January 5, 1914, had the rank and pay of sergeant, an office classified under the civil service rules of the Commonwealth. The respondent Cadogan (herein called the respondent) is an alderman of the city and director of public safety, having under his management the sub-department of police. The charter of the city of Lawrence (St. 1911, c. 621, Part II) provides in § 43 that: "The . . . director of public safety [and certain other directors of the city] . . . shall have the power to appoint, suspend or remove, subject to the provisions of section forty-four and the laws of the Commonwealth, any officer, officers, board or boards in their respective departments." Section 44 contains the following: "All removals from appointive offices shall be accompanied by a statement of the reason or reasons therefor under the signature of the director removing the officer or officers, and a copy of the statement shall be filed in the office of the city clerk." Assuming that these sections apply to cases where an officer is lowered in rank, as well as to cases of suspension and removal, admittedly the requirements of the charter were complied with by the respondent.

The main contention of the petitioners is that the attempted reduction in rank was invalid, because of the respondent's failure to notify them of his proposed action, in accordance with the requirements of the civil service law. Sts. 1904, c. 314, § 2; 1906, c. 210. As the single justice who heard the cases ordered that the petitions be dismissed, the only question before us on the report is whether the petitioners are entitled to a writ of mandamus as matter of law. The notice of which they complain was not liter-

ally and formally correct. We cannot say, however, that the single justice was not warranted in finding that "under these circumstances the fair construction of the order is that the writer has decided to reduce the rank of the officer, and that that decision will take effect January 7." The statutory requirement that the person sought to be lowered in rank shall be notified of the proposed action, and furnished with a copy of the reasons, is mainly for the purpose of enabling him to secure a public hearing if he desires one, and to answer charges where any are preferred against him. Here no charges were made against either petitioner. The reason assigned for his action by the respondent was that there were too many sergeants on the police force; and so far as appears the reason alleged was true, and was declared in good faith. If the petitioners desired to controvert this, it is found by the single justice that they had ample time in which to ask for a hearing before the order took effect. The statute does not prescribe the length of time for giving notice, and they were entitled to a reasonable notice under the circumstances. *McCarthy v. Commonwealth*, 204 Mass. 482, 485. In fact they never requested a public hearing, asked for no extension of time, and apparently took no action until April 11, when these petitions were filed.

As the report discloses no error of law, the decision of the single justice must be given effect; and in each case the petition must be dismissed. *Hodgdon v. Fuller*, 193 Mass. 331. *Andrews v. Mines Corp., Ltd.* 205 Mass. 121.

So ordered.

GEORGE T. FISHER'S (dependent's) CASE.

Suffolk. March 10, 1915. — April 1, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act. Proximate Cause.

Where a workman who already was subject to an affection of the valves of the heart and who earlier in the day had been engaged in heavy lifting and in carrying two buckets of water at a time up a slight incline, so that his heart muscle was tired and exhausted, suddenly fell to the ground after lifting a bag of coal weighing one hundred and fifty pounds and died of heart disease after about

five minutes of unconsciousness, and where, at the hearing before an arbitration committee upon a claim by his dependent widow under the workmen's compensation act, a medical examiner testified that the employee died from debilitation of the heart caused by the abrupt lifting of the load, it was held, that a finding was warranted that the injury that caused the workman's death arose out of and in the course of his employment.

PIERCE, J. This is a claim under the workmen's compensation act. The insurer contends that the finding of the majority of the arbitration committee, as affirmed by the Industrial Accident Board and in turn by the Superior Court, that the employee's death was caused by an injury arising out of and in the course of his employment, is not supported by the evidence reported. As all the material evidence is reported this contention is open. *Herrick's Case*, 217 Mass. 111.

On the morning of the day he died the deceased had been at work helping to erect a stone crusher. This work involved some heavy lifting. About noon time, preparatory to the unloading of a steam roller from a railroad flat car, he made six or seven trips from the car to a pump about four hundred feet away, and in each instance, after filling two buckets with water at the pump, he returned to the car carrying the filled buckets up a slight incline. Upon his return he passed the buckets and contents to a man standing on the flat car.

He then undertook to carry from a wagon to the flat car bags of coal, each weighing approximately one hundred and fifty to two hundred pounds. The first to be taken was handed to him and carried by him to the car; the next bag was rested by the passer upon the rim of a wagon wheel. As the decedent reached to take this bag from the wheel the helper turned to attend to some other duty; he did not see what the deceased further did, but within a minute saw him lying on the ground in a dying condition. He (the decedent) was breathing, but did not speak, and died within five minutes.

The medical examiner of the district where the death occurred reported, and it is not disputed, that the death was due to heart disease.

At the hearing before the arbitration committee the examiner stated that the story told him on the day the decedent died differed from the testimony given at the hearing, in that the story then was that the decedent, after lifting a bag of coal weighing from

one hundred and fifty to two hundred pounds, suddenly fell to the ground, gasped, "never moved an arm or an eyelid, . . . had not breathed at all or moved a muscle," while at the hearing the testimony was to the effect "that he lived five minutes but was unconscious." He further testified that if the decedent had not breathed once, "he would ascribe the lifting of the load of one hundred and fifty to two hundred pounds to be the cause of death;" that "if he lived five minutes, there are two diagnoses. One would be a cerebral embolism, thrombus or hemorrhage; the other would be an acute dilatation of the heart that was not sufficient to stop the heart immediately, and would be due to the lifting of the load weighing one hundred and fifty or two hundred pounds, or even less." He also testified that "it was apparent that this final exertion was of a character to put a maximum of work upon his [the decedent's] heart, and assuming a diseased heart muscle already tired or exhausted, that would be a sufficient cause for the inability of the heart to perform its work so that death resulted." He finally stated that "he did not mean that in his mind there was a doubt under all the circumstances, and that under all the circumstances he still held to his opinion that it was exertion. 'I am simply taking all the facts in the case and rendering an opinion, and my opinion is that the man died of debilitation of the heart caused by the abrupt lifting of the load. The lifting of the load was the contributing cause — an important factor.'"

Dr. John P. Bradford testified that he had treated the decedent in 1910 for acute articular rheumatism; and that "physicians look for affection of the valves of the heart in cases of acute inflammatory rheumatism." Dr. Thomas F. Aiken, called as an expert by the insurer, testified that "a man who had an acute attack of articular rheumatism invariably has a heart disease of the valvular type following. It is expected in almost every case. When the valves have become crimped and the heart weakened thereby, it would naturally be expected that heart disease would cause death either at one time or another."

The testimony of the two physicians justified the medical examiner's assumption that the decedent's heart muscle was tired and exhausted before and at the time of his entry upon his last labor and made reasonable his opinion that the decedent's final exertions

were under all the circumstances a sufficient cause for the inability of the heart to perform its work so that death resulted.

It is impossible to say that there was no evidence upon which the finding could be made. The result is that the decree of the Superior Court must be affirmed. *Brightman's Case, ante*, 17.

So ordered.

C. L. Allen, for the insurer.

No counsel appeared for the dependent widow.



JAMES E. WOOLEY & another vs. CITY OF FALL RIVER.

Bristol. March 11, 1915. — April 1, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Damages, For property taken or impaired under statutory authority. *Evidence*, Photographs, Remoteness, Of value. *Way*, Public: laying out.

Upon a petition for the assessment of damages sustained from the laying out as a public highway of a private street adjoining the petitioner's land and changing its grade, it is proper to base the damages upon the assumption that the street will be completed to the grade established by the order for its laying out, and the damages are not to be limited to the effect of the change of grade that exists at the time of the trial after a temporary suspension of the work on the street.

In such a case it is proper for the presiding judge to permit the jury to consider evidence of the cost of raising the petitioner's house and of filling and raising the grade of the petitioner's land or of a part of it, if the jury first find that to raise the house and raise the land is a reasonable, economical, proper and advantageous way of treating the property in the situation that will exist when the street shall have been raised to the grade established by the order.

At the trial of a petition for the assessment of damages sustained from the laying out as a public highway of a private street adjoining the petitioner's land and raising the grade of such street, the presiding judge in his discretion properly may permit the introduction in evidence of a photograph of the land taken about fifteen years before the trial by the petitioner, who had lived on the land off and on for sixteen years and who testified that "no one ever touched the street until the city accepted it."

At the same trial it is proper for the presiding judge to permit the petitioner to testify what he considers was the fair market value of the land immediately before the order for the laying out of the street, such an owner being assumed to have a knowledge of his property adequate to form an intelligent estimate of its value.

PETITION, filed on May 22, 1912, for the assessment of damages to the petitioners' real estate from the laying out of West Slade Street in Fall River and the raising of the grade of that street.

In the Superior Court the case was tried before *McLaughlin, J.* The evidence is described in part in the opinion. James E. Wooley, one of the petitioners, testified that he was a part owner of the land and had lived on it off and on for sixteen years, that a photograph, which was offered in evidence by the petitioners, was taken by him about fifteen years before the trial, and that "no one ever touched the street until the city accepted it." The judge admitted the photograph in evidence subject to the respondent's exception. This witness was asked what he considered the fair market value of the property immediately before the passage of the order for the laying out; and, subject to the respondent's exception, was permitted to answer that it was worth from \$2,300 to \$2,500.

At the close of the evidence the respondent asked the judge to give certain instructions to the jury, the eighth and ninth instructions requested being as follows:

"8. You are instructed to disregard all evidence introduced at the trial relating to the cost of raising the petitioners' house.

"9. You are instructed to disregard all evidence introduced at the trial relating to the cost of filling and raising the grade of the petitioners' land or any part thereof."

The judge refused to give these and other instructions requested by the respondent, and instructed the jury, among other things, as follows:

"Generally speaking the measure of damages in cases of this sort is the fair market value of the property immediately before the passage of the order in question, less the fair market value of the property immediately after the passage of the order in question. That is, it would be your duty, at the outset, when you come to determine the question as to whether the petitioners' property has been injured, and if so to what extent, to determine in the first place what that estate was worth immediately before June 21, 1911, the date of the passage of the order by the board of aldermen. . . . So, determining as well as you can, in the light of all that you know about the property, what its fair market value was immediately before the passage of the order of June

21, 1911, you then proceed to ascertain what its fair market value was immediately after the passage of that order of June 21, 1911. Well, you can see that the physical aspects of the place were precisely the same immediately after the passage of the order as they were immediately before the passage of the order, and that, perhaps for some time and on the evidence for a number of months, it lay in precisely the same condition as it was before the passage of the order; but you are to determine the market value of the property after the passage of the order, not in the light of those physical conditions which actually existed immediately after the passage of the order, but in the light of those physical conditions which will exist when that order is actually carried out to the full extent which its terms require, namely, when that street is carried up to the grade which the order establishes. So that when I ask you to determine what the market value of the property was immediately after the passage of the order, I ask you to determine it on the assumption that immediately after the passage of the order that street suddenly, as it were, was raised to the grade to which the order of the board of aldermen requires it shall be raised, and to which the authorities of the city are bound later to raise it. Then in the light of that physical situation you will determine what that property is worth. . . . Evidence has been introduced here as to what it would cost to raise the yard, or the land, to the same relative position with reference to the new street as it had with reference to the old. Well, there is no rule of law that because the grade of a street is raised that a person is entitled, as matter of law, to such an amount as will enable him to restore the same, re-establish the same relative conditions that existed before the passage of the order for the doing of the work. The only competency and the only purpose and the only reason, why evidence as to the cost of their raising the house and raising the garden or the yard was introduced, was in the event that you find that the most reasonable and economical and advantageous way of treating that property is to raise the house and the garden. You will attach no importance to the evidence relating to the cost of raising the house and you will attach no importance to the cost of raising the land, unless you find that to raise the house or to raise the land is a reasonable, economical, proper and advantageous way of treating that property, in the light of the situation

that will exist when that street is raised to grade. . . . Ascertain first the fair market value of the property immediately before the passage of the order, then ascertain the fair market value of the property immediately after the passage of the order, in the light of all the circumstances, of the conditions of the property in which it is left, and in the light of the assumption that the order is actually carried out and the work done which the order contemplates, and in the light too of any special, direct and peculiar benefit, if there was any such direct, special and peculiar benefit which attached to the property by reason of the passage of the order, or to put it in another way, which attached to the property by reason of the doing of the work or the contemplated doing of the work which the order provided for. Then, I say, ascertain the fair market value of the property after the passage of the order, in the light of all these considerations and circumstances under which it is left, in the light of the assumption that the order is carried out, and in the light of any special, direct or peculiar benefit which attached to the property by reason of the passage of the order. Now, when you shall have ascertained the fair market value in that way, as it was after the passage of the order, subtract that fair market value from the fair market value of the property as it was immediately before the passage of the order, and the difference, if there is any difference, is the amount of damages which these petitioners are entitled to. If there is no difference, if the fair market value of the property after the passage of the order, in the light of these circumstances and conditions which you are to consider in determining that fair market value, if it is equal or no less than the fair market value of the property as it was before the passage of the order, why then, your verdict should be for the respondent. But if there is a difference, if the fair market value of the property after the passage of the order is less than it was before the passage of the order, then that is the amount of damage which the petitioners are entitled to, after you have added interest upon that amount at the rate of six per cent from the date on which the defendant's agents entered upon the street to do the work, which was the fifth day of April, 1912."

The jury returned a verdict for the petitioner in the sum of \$786.10; and the respondent alleged exceptions.

G. Stevens of New York, (*R. A. Dean* with him,) for the respondent.

B. Cook, Jr., for the petitioners.

DE COURCY, J. The petitioners owned two adjoining forty-five-foot lots on the southerly side of a private way now known as Slade Street in Fall River. The front portion of the westerly lot was practically on a level with the street, but the easterly lot sloped from west to east so that the northeasterly corner was from fifteen to eighteen inches below the surface of the way. Slade Street was laid out as a public way and its grade established by the city of Fall River on June 21, 1911. The city authorities entered upon the land on April 5, 1912, and proceeded to work the street to grade. They ceased work upon it in December, 1912, at which time the surface of the grade had been raised about two feet at the northeast corner of the petitioner's property, where the established grade called for a raise of five and one half feet; and it remained in that condition at the time of the trial. So far as the record discloses, however, no offer was made by the respondent to show that the established grade had been abandoned, or that the suspension of the work of grading was other than temporary. See *Como v. Worcester*, 177 Mass. 543.

On the facts appearing at the trial the damages to which the petitioners were entitled properly were based on the assumption that the street would be worked to the established grade, and were not limited to the grade as it existed temporarily when work was suspended in December, 1912. *Snow v. Provincetown*, 109 Mass. 123. *Brady v. Fall River*, 121 Mass. 262. Subsequent completion of the work of bringing the street to the established grade, if made within a reasonable time, presumably would be part of the original construction, for which the petitioners could recover no additional damages. *Geraghty v. Boston*, 120 Mass. 416. The respondent's requests for instructions relating to this subject were refused rightly. The eighth and ninth properly could not be given; and the trial judge accurately instructed the jury upon the proper application of the evidence as to the cost of putting the property in the same condition relatively as before, as one of the steps in determining the diminished value of the premises. *Buell v. County of Worcester*, 119 Mass. 372. In short, the principles of law and rules of evidence applicable to the case were ex-

plained to the jury in a charge that was correct, comprehensive and clear.

There were numerous exceptions to the admission and exclusion of evidence. Plainly the photograph was admissible in the discretion of the judge. *Everson v. Casualty Co. of America*, 208 Mass. 214. We find no error in the admission of the evidence of the petitioner Wooley. Usually the owner is assumed to have a knowledge of his property adequate to form an intelligent estimate of its value. *Shattuck v. Stoneham Branch Railroad*, 6 Allen, 115. *Patch v. Boston*, 146 Mass. 52, 57. *Lincoln v. Commonwealth*, 164 Mass. 368, 380. *Shea v. Hudson*, 165 Mass. 43.

The remaining exceptions have been considered and call for no special mention.

Exceptions overruled.

WARREN B. P. WEEKS & others, trustees, vs. WILHELM-DEXTER COMPANY.

Suffolk. November 13, 1914. — April 2, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Landlord and Tenant, Covenants in lease. Contract, Construction. Practice, Civil, New trial. Supreme Judicial Court.

A covenant in a lease to a manufacturer of paints, shellac and oils, which he mixed and kept in the basement of the leased premises, that the lessee "will at the expiration of this lease remove all rubbish . . . and peacefully yield up . . . the premises . . . clean and in good repair, order and condition in all respects," is not repugnant to another covenant preceding it in the same lease, that the lessee will maintain the premises "in such repair, order and condition as the same are in at the commencement of said term or may be put in during the continuance thereof," and, if at the end of the term the floors of the leased premises are covered with a thick, irremovable, mucilaginous deposit that had accumulated during the terms of previous leases to the same lessee and was there at the beginning of this term, the lessee on giving up the premises is liable for the cost of putting the floors in good order and condition.

Where in an action of contract, at the trial of which the presiding judge ordered a verdict for the defendant, exceptions alleged by the plaintiff are sustained by this court, and it appears by the bill of exceptions that, under the instructions of the judge and the answers returned by the jury to questions put to them by

him, the damages which the plaintiff is entitled to recover have been assessed by the jury, there is no occasion for a new trial, and under St. 1913, c. 716, § 2, an order will be made for the entry of a judgment for the plaintiff in the sum found by the jury.

CONTRACT by the owner of a large building known as the Fort Hill Building, numbered from 142 to 146 inclusive, on High Street in Boston, against a corporation engaged in the manufacture and sale of paints, shellac and oils, which it had mixed and kept in the basement of the premises leased by it from the plaintiffs, for the alleged breach of a covenant in the lease from the plaintiffs to the defendant to remove all rubbish at the expiration of the lease and to yield up the premises to the lessors "clean and in good repair, order and condition in all respects." Writ in the Municipal Court of the City of Boston dated January 27, 1913.

Upon removal to the Superior Court the case was tried before *Hitchcock, J.* The material portions of the lease are quoted in the opinion. At the close of the evidence the plaintiffs asked the judge to make twelve rulings, of which the judge made the seventh, tenth and twelfth as quoted below, and refused to make any of the others including the third and fourth, which were as follows:

"3. That under the terms of the lease the defendant was bound on the expiration of the term to deliver and surrender to the plaintiffs the premises clean and in good repair, order, and condition.

"4. That under the terms of the lease the defendant was bound on the expiration of the term to deliver and surrender to the plaintiffs the premises clean and in good repair, order, and condition irrespective of the condition of said premises at the commencement of the term."

The rulings requested by the plaintiffs which were made by the judge were as follows:

"7. That the defendant was bound to surrender and deliver said premises clean and in good repair, order, and condition irrespective of any consideration of reasonable wear and tear whatsoever."

"10. That the plaintiffs are entitled to recover whatever sum it would cost to put the premises in the condition in which the defendant was bound to leave them."

"12. That the plaintiffs were not obliged to clean the floor if

the same was impracticable, but were legally entitled to install a new floor consistent with the general character of the building."

The judge submitted to the jury four questions, the first three of which, with the answers of the jury, were as follows:

"1. Were the premises in question left by the defendant at the expiration of the lease declared on clean and in good repair, order and condition in all respects?" The jury answered, "No."

"2. If question No. 1 is answered in the negative, what was the fair and reasonable cost in the most reasonably economical manner of cleaning the premises and putting them in good repair, order and condition in all respects after the termination of the tenancy of the defendant?" The jury answered, "\$297."

"3. Were the premises in question left by the defendant at the expiration of the lease declared on (January 1, 1913), clean and in as good repair, order and condition in all respects as they were in on January 1, 1912, at the beginning of the term covered by the lease?" The jury answered, "Yes."

The fourth question became immaterial because it was required to be answered only in case the jury should answer the third question in the negative.

Upon receiving the answers of the jury the judge ordered a verdict for the defendant; and the plaintiffs alleged exceptions.

The case was submitted on briefs at the sitting of the court in November, 1914, and afterwards was submitted on briefs to all the justices.

L. A. Ford & O. T. Russell, for the plaintiffs.

J. W. Spaulding & P. M. Lewis, for the defendant.

BRALEY, J. The demised premises were occupied and used by the defendant for the manufacture and sale of paints, shellac, oils and similar compounds, and the answer of the jury to the third question establishes the fact that the basement and ground floors were in the same general condition at the end as at the beginning of the term.

But in addition to the covenant to maintain "the said premises, including the plumbing, in such repair, order and condition as the same are in at the commencement of said term or may be put in during the continuance thereof," the lessee further covenanted that it "will at the expiration of this lease remove all rubbish and all goods and effects of itself and of all persons claiming under it,

and peacefully yield up to the lessors, or to those having their estate therein, the premises and all erections and additions made to or upon the same, clean and in good repair, order and condition in all respects."

It is plain that under the first covenant the defendant was bound only to deliver the premises in the same good order and condition as at the date of the lease, reasonable use and wear excepted, and failure to do this would subject the lessee to damages, in a sum sufficient to put them in the required condition. *Watriss v. First National Bank of Cambridge*, 130 Mass. 343, 345.

The second covenant, however, is not repugnant to the first covenant. The defendant had been in occupation under previous leases during which the deposit on the floors of a thick, irremovable mucilaginous substance had accumulated and the lessee did no more than to covenant to restore the building to a rentable condition. By this construction all parts of the instrument are reconciled and full force and effect given to each covenant. *Ferguson v. Union Mutual Life Ins. Co.* 187 Mass. 8, 10, and cases cited. *Ball v. Wyeth*, 8 Allen, 275. *Hill v. Hayes*, 199 Mass. 411.

The jury having specially found that the lessee at the expiration of the lease failed to leave the premises "clean and in good repair, order and condition in all respects," the verdict for the defendant was ordered improperly.

If the jury found the covenant to have been broken, the measure of damages was specially submitted to them, in accordance with the plaintiffs' seventh, tenth and twelfth requests, and their other requests for rulings as to damages, not having been argued, are to be treated as waived.

It follows that, while the exceptions must be sustained, a new trial is not called for and the plaintiffs are to have judgment for the amount found by the jury, with interest from the date of the writ. St. 1913, c. 716, § 2.

So ordered.

ANNIE M. THORNHILL vs. CARPENTER-MORTON COMPANY.

Worcester. November 20, 1914. — April 2, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Dangerous Substance. Negligence, In compounding dangerous substance. *Evidence*, Matters of common knowledge, Opinion: experts, Experiments. *Practice, Civil*, Conduct of trial, Demurrer, Appeal.

If a manufacturer of and dealer in paints, oils, varnishes and oil stains, puts on the market, without giving any notice of the inflammable and dangerous character of the substance, cans bearing his name as the manufacturer containing "walnut oil stain," which has been made for him by his order and at least fifty per cent of which is composed of volatile and inflammable ingredients that on exposure to the air quickly will vaporize, producing a gas that will ignite instantly on coming in contact with the flame of a lighted match, and if, when a purchaser in the market of one of these cans is engaged in applying its contents to the floor of a room, he finds it necessary to light a match and instantly there is an explosion of volatile vapor followed by the immediate ignition of the entire surface to which the stain has been applied, causing personal injury to the wife of the purchaser when she is in the exercise of due care, the purchaser's wife can maintain an action for her injuries against such dealer who put the stain on the market.

It is to be assumed that jurors as a matter of common knowledge are familiar with the fact that it is customary to use oil stains upon floors and know that such oil stains after being applied to floors ordinarily do not explode and ignite when the person engaged in using the stain happens to light a match.

If, when a woman sees the portion of a floor to which her husband has applied a walnut oil stain from a can of that substance suddenly burst into flame, she seizes the can and tries to extinguish the fire, this action taken in an emergency is not negligence as matter of law and does not deprive her of the right of going to the jury in an action brought by her against the dealer who put the explosive and inflammable substance on the market to recover for her injuries from the flames.

In an action for personal injuries caused by the sudden ignition of a walnut oil stain when it was being applied to a floor, an expert properly qualified may be allowed to give his opinion as to the distance from the floor at which ignition of the inflammable substance would be produced by a lighted match.

At the trial of an action for personal injuries caused by the sudden ignition of a walnut oil stain when it was being applied to a floor, it is within the discretion of the presiding judge to refuse to permit an experiment to be tried by lighting and extinguishing a can of the inflammable oil stain in the presence of the jury, where the conditions under which the accident occurred are so different from the conditions in the proposed experiment that it cannot assist the jury unless supplemented by collateral evidence.

An appeal of a defendant from an order overruling his demurrer to certain counts

of a declaration, to which other counts afterwards were added by amendment, is disposed of by an order of the presiding judge directing the jury to return a verdict for the defendant on the counts demurred to, thus making the demurrer immaterial.

TORT against the alleged manufacturer and seller of a certain walnut oil stain for personal injuries sustained by the plaintiff on May 25, 1908, from the sudden ignition of the volatile and inflammable gases contained in the stain when a match was lighted in the room where the plaintiff's husband was applying the stain to the floor, the defendant having put the stain on the market, where it was bought by the plaintiff's husband, without giving any notice of its inflammable and dangerous character of which the plaintiff and her husband were ignorant. Writ dated March 2, 1909.

The declaration originally contained two counts. The defendant demurred. There was a hearing on the demurrer before *Richardson, J.*, who made an order overruling the demurrer, from which the defendant appealed. Later the case was tried before *Quinn, J.* At the opening of the trial the plaintiff was allowed to amend her declaration by adding a third and a fourth count. The facts that could have been found upon the evidence are stated in the opinion, where also the rulings of the judge in regard to evidence to which the defendant excepted are described.

At the close of the evidence the defendant asked the judge to make twelve rulings. Of these the judge gave as instructions to the jury the tenth and eleventh rulings requested, which were as follows:

"10. The plaintiff cannot recover on the first and second counts of the amended declaration.

"11. The plaintiff cannot recover without showing that both she and her husband were in the exercise of due care."

The other rulings asked for by the defendant were as follows:

"1. On all the evidence the plaintiff cannot recover.

"2. On the pleadings the plaintiff is not entitled to recover.

"3. The plaintiff cannot recover in this case without proving that the defendant was the actual manufacturer of the stain in question.

"4. Even if the jury should find that the defendant caused

said stain to be labeled as manufactured by it pursuant to a trade custom, when in fact the same was manufactured by some other person or corporation, such fact would not render the defendant liable even if the real manufacturer might be held liable.

"5. If the jury should find that the defendant purchased said stain in the usual course of business from a well known manufacturer, believing, and having a right to believe, that said stain was an ordinary article of paint or staining merchandise, and sold the same in the usual course of its business as a dealer in paints, the defendant is not liable.

"6. The manufacturer of an article of commerce such as the stain in question cannot be held responsible for injuries suffered by a person buying such stain from a third party, unless the plaintiff shall show that the manufacturer actually knew that said stain was improperly made in such way as to be dangerous to persons using such article in a proper way for the purpose for which it was intended.

"7. The gist of an action brought by a person injured through an alleged defect in an article of ordinary merchandise [not peculiarly dangerous], not purchased by the person injured from the manufacturer, consists of guilty knowledge on the part of the manufacturer of the dangerous nature of the article manufactured for general sale.

"8. The manufacturer of an article of merchandise, such as this stain, is not responsible in damages to any persons who may receive injuries because of its defective composition or construction, to which the said article is not by such manufacturer sold, even if the manufacturer might, by the exercise of reasonable diligence, have discovered such defective composition.

"9. It is a matter of common knowledge that stains and paint products generally contain oils and other inflammables, and the plaintiff must be held to have known that which is matter of general knowledge."

"12. There is no evidence warranting the finding that the plaintiff was in the exercise of due care."

The judge gave the seventh ruling requested as an instruction to the jury after inserting the words "not peculiarly dangerous" which are printed above enclosed in brackets. He refused to make any of the other rulings requested excepting the tenth and

eleventh as printed above. He ordered a verdict for the defendant on the first and second counts and submitted the case to the jury on the third and fourth counts of the declaration. The jury on those counts returned a verdict for the plaintiff in the sum of \$2,500; and the defendant alleged exceptions.

G. W. Anderson, for the defendant.

J. A. Thayer, for the plaintiff.

BRALEY, J. It was uncontroverted that the defendant, a manufacturer and dealer in paints, oils, varnishes and oil stains, instead of making it, obtained the walnut oil stain from another company which it put upon the market, although the label on the cans, with the directions for use, represented that the stain was of its own manufacture.

The plaintiff's husband bought a can of this stain and while applying the contents in the ordinary way to the floor of a room, where because of gathering darkness it became necessary to light the chandelier, drew a match across his clothing, and the jury could find that as the match flamed there was an explosion of volatile vapor given off by the stain, followed simultaneously by the ignition of the entire surface to which it had been applied.

It is immaterial that previous to the accident the stain, whether in process of manufacture or use, never had ignited, for the jury would have been warranted in finding upon conflicting evidence that at least fifty per cent of the stain was composed of volatile oil, turpentine and petroleum products, including benzine, and these ingredients, especially the benzine, would quickly vaporize on exposure to the air, producing a gas which would instantly ignite on coming in contact with a lighted match. *Dulligan v. Barber Asphalt Paving Co.* 201 Mass. 227, 231. *Gately v. Taylor*, 211 Mass. 60, 62.

While no contractual relation existed between the defendant and the plaintiff or her husband, the jury could say that the stain had been represented as a "walnut stain," designed for certain uses, but because of an unusually high degree of inflammability it was explosive and might cause serious personal injuries by taking fire when used under ordinary circumstances, one of which might be the necessity of using artificial light during application.

It is no justification that the defendant procured the stain instead of having it compounded on its own premises. The jury

could find that, if the defendant was not the originator, those who prepared the mixture simply executed the defendant's orders, and its representations to the purchasing public or consumer, without any notice of the dangerous character of the compound, that it was the manufacturer must be taken as essentially true. *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64, 68. See *Murphy v. Arnsen*, 96 U. S. 131.

It is urgently pressed that even if the defendant is held to be the manufacturer, it is not culpable unless shown to have possessed actual knowledge of the dangerous qualities of the stain. Proof, however, of actual knowledge is not required where the article is so made up as to be inherently harmful. The manufacturer who puts or causes the component parts to be put together, or accepts them as his own after they are assembled, must be presumed to know the nature and quality of the resultant compound which he solicits the public to purchase. The defendant's product, it is true, was placed upon the market and sold as an oil stain, yet it is not the name of the article which determines its qualities. If the parts are not compounded in proper and safe proportions, while it may be called a "stain," the excess of benzine, or other volatile oils, as we have said, could be found by the jury to have made it a highly inflammable and dangerous fluid or substance.

The distinction between the case at bar and *Lebourdais v. Vitrified Wheel Co.* 194 Mass. 341, is plain. In that case the defendant was a manufacturer of emery wheels, and the plaintiff while at work was injured by the explosion of a wheel which his employer had bought and installed. It was held that he could not recover in the absence of knowledge on the part of the defendant that the wheel was defective when it left the factory. But an emery wheel which may explode when revolving at high speed is not recognized as intrinsically harmful, and the manufacturer who makes and vends articles of ordinary use, which of themselves are harmless, is ordinarily held not to be answerable if when in use personal injuries are caused by reason of their defective construction. *Lebourdais v. Vitrified Wheel Co.* 194 Mass. 341, 343, and cases cited. Nor would a retail dealer or wholesale jobber under the circumstances disclosed be liable.

It is settled that, whether the defendant was responsible in damages to the plaintiff because of the inherently dangerous prop-

erties of its article denominated a stain of which no notice was given and of which the purchaser had no knowledge, was upon all the evidence in the record a question of fact for the jury under appropriate instructions. *Leavitt v. Fiberloid Co.* 196 Mass. 440, 444, and cases cited. *Gately v. Taylor*, 211 Mass. 60. *Wilson v. J. G. & B. S. Ferguson Co.* 214 Mass. 265, 266. *Roberts v. Anheuser Busch Brewing Association*, 215 Mass. 341. *Ellis v. Republic Oil Co.* 133 Iowa, 11. *Waters Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 508. *Standard Oil Co. v. Parrish*, 76 C. C. A. 405. *Riggs v. Standard Oil Co.* 130 Fed. Rep. 199.

The distinctions to which we have adverted were clearly covered by the full, careful and sufficient instructions to the jury. The third and fourth counts under which the case was submitted to them are stated to be for one and the same cause of action, and having aptly alleged that the defendant knew, or in the exercise of reasonable care ought to have known, that the stain as compounded and sold without notice of its nature and qualities was inherently dangerous, the instructions requested as framed in so far as applicable to the question of its liability could not have been given. *Little v. Blunt*, 13 Pick. 473, 476. *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64, 67, 68. *Colvin v. Peabody*, 155 Mass. 104, 107. *Goodhue v. Hartford Fire Ins. Co.* 175 Mass. 187, 188.

The defendant also maintains that the plaintiff and her husband acted carelessly and that the first request, that on all the evidence she could not recover, was refused wrongly.

It is to be presumed that the jurors from common knowledge were familiar with the customary use of oil stains, and that ordinarily such stains did not ignite and explode if the workman, while applying them, happened to light a match, and the plaintiff's husband is not shown to have had any greater information. If he was to continue his work the room must be lighted, and the mode of lighting was sufficiently common to justify a finding that he was not careless.

Nor can it be said as matter of law that the plaintiff's conduct in seizing the can and endeavoring to extinguish the fire, causing injuries from burns for which she seeks damages, shows a lack of reasonable precaution. It well may have seemed to her that not only her husband's safety, but their home, was imperilled

and prompt action must be taken. The deliberation with which foreseen conditions in human affairs can be met or avoided is one thing, the action taken in an emergency is quite another thing.

The jury, to whom this question also was left properly under instructions which fully guarded the defendant's rights, were to determine whether under the circumstances the plaintiff used reasonable care. *Hanley v. Boston Elevated Railway*, 201 Mass. 55, 58. *Steverman v. Boston Elevated Railway*, 205 Mass. 508, 513. *Gately v. Taylor*, 211 Mass. 60.

The exceptions to the admission and exclusion of evidence in so far as argued remain. The plaintiff's expert, a professor in chemistry, whose qualifications rendered his evidence admissible in the opinion of the presiding judge who does not seem to have exceeded his discretionary powers, was properly permitted to state the result of his analysis of the stain, and his tests to ascertain the distance at which ignition would be produced.

If the form in which some of his answers as first given was objectionable, the objection was removed when in reply to unexceptional questions, he gave his opinion as a qualified expert, the weight of which was for the jury. *Carroll v. Boston Elevated Railway*, 200 Mass. 527, 533. *Bierce v. Stocking*, 11 Gray, 174.

The plaintiff's expert having testified that a can of the stain could be lighted in the presence of the jury and easily extinguished, the defendant offered to make the experiment, but the evidence was excluded. The inciting cause of the explosion does not seem to have been questioned, but the conditions under which it occurred were so manifestly different from the conditions when the experiment was proposed, that it would not have assisted the jury unless supplemented by collateral inquiries. The admission of such evidence being largely within the discretion of the judge, we cannot say that his ruling was clearly wrong. *Dow v. Bulfinch*, 192 Mass. 281, 285. *Field v. Gowdy*, 199 Mass. 568. *Commonwealth v. Buxton*, 205 Mass. 49.

The jury by order of the court having returned a verdict for the defendant on the first and second counts, its appeal from the order overruling the demurrer as to those counts is disposed of; and finding no error of law, the exceptions must be overruled.

So ordered.

CONNERS BROTHERS COMPANY vs. JENNIE E. SULLIVAN & others.

Middlesex. December 1, 1914. — April 2, 1915.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Bills and Notes, Accommodation indorser. *Contract*, Agreement in writing. *Evidences*, Presumptions and burden of proof, Competency, Admissions and confessions. *Practice, Civil*, Exceptions, Judge's charge. *Witness*, Impeachment. *Estoppel*.

If, at the request of a lender of money and wholly for his convenience and accommodation, a person consents to have the title to certain promissory notes and mortgages securing them pass through him as a conduit with the understanding and agreement that he shall incur no personal liability, and if in pursuance of this agreement the notes and mortgages are made to him and he indorses the notes to the lender and transfers the mortgages to him; the lender cannot recover in an action against him as indorser, because in such an action brought by the party accommodated the indorser is free to show the facts in defence.

In such an action, where the facts are in dispute, the burden is on the plaintiff to prove that the defendant received a consideration for his indorsement of the notes.

It is settled that no exception to a portion of the charge of a presiding judge will be sustained where the charge as a whole sufficiently states the law applicable to the issues tried between the parties and where, as in the present case, the failure of the jury to adopt the view of the excepting party cannot be attributed to any fault of the judge and is not an error of law.

In an action on certain promissory notes against an indorser, whose defence is that he indorsed the notes without consideration at the request and for the accommodation of the plaintiff, where the defendant, testifying as a witness, has admitted on his cross-examination that before he brought a certain action against the plaintiff on an independent demand he had claimed the right to set off that demand against his liability on the notes on which he now is sued, not then setting up his present defence on the notes, the record of a judgment against the witness in the action referred to is not admissible to impeach his credibility, because that judgment settled only the controversy then on trial, and does not affect the present issue either by estoppel or as an admission.

CONTRACT by a corporation having its usual place of business at Lowell against Jennie E. Sullivan and G. Cleveland Sullivan as the joint makers of thirty-four promissory notes and against John J. Gray as the indorser of these notes. Writ dated June 7, 1911.

In the Superior Court the case was tried before *Pratt, J.* The defendants Sullivan were defaulted and the trial proceeded against the defendant Gray as indorser. The substance of the evidence

is described in the opinion. Thirteen of the notes in suit were dated May 1, 1908, and became payable at various times thereafter, and the remaining twenty-one notes were dated November 5, 1908, and became payable at various times thereafter. Each series of notes was given in payment for a lot of horses, wagons, harnesses and other teaming equipment sold by the plaintiff at times corresponding respectively to the dates of the series of notes. All the notes were payable to the defendant Gray and were indorsed by him in blank, waiving demand and notice. Each set of notes was secured by a mortgage on the personal property sold at the time the notes were given, which mortgage in each instance ran from the Sullivans jointly to Gray and was assigned by Gray to the plaintiff. No question was raised as to the execution of the notes and their indorsement and delivery by the defendant to the plaintiff, or as to the amount remaining unpaid thereon.

Gray's defence at the trial was based entirely upon an alleged lack of consideration for his indorsements. He relied on the alleged facts and arguments, that the notes and mortgages were made out by the plaintiff's attorney and were signed by the makers, the defendants Sullivan, and that subsequently the defendant Gray was requested to come to the office of the plaintiff's attorney to execute the assignment of the mortgages and to indorse the notes to the plaintiff; that the defendant Gray never owned the property nor had any interest in it, and that there was no contention that Gray gave anything to the defendants Sullivan or either of them for this transfer, or that the plaintiff gave any consideration to Gray for his transfer and indorsement at the time or sustained any loss or detriment thereby or that Gray was under any obligation to the plaintiff; that the plaintiff was not a holder of the notes in due course, because the plaintiff knew and had notice that the defendant Gray had no right, title or interest in the notes or property; that Gray never had possession of the notes and could not have completed their negotiation by delivery; that he simply acted as a conduit and that the indorsement was in effect a qualified indorsement resorted to by the plaintiff to indicate of record a transaction between the defendants Sullivan and Gray instead of a transaction between the plaintiff and the defendants Sullivan.

The defendant Gray testified as a witness on his own behalf. On his cross-examination by the plaintiff he testified that in August, 1909, he brought a bill in equity against the Connors Brothers Company and that he signed this bill in equity and made oath to it. Then followed the following questions and answers: "Q. Then your claim at that time, with reference to these notes, was that you were liable on these notes, but that you were going to set off against that liability another sum that they owed you? A. I never claimed to be liable on those notes. I signed that bill in equity with that in it. Q. Why didn't you say, in this bill in equity, that you never intended to be liable on these notes, and that they were only given to accommodate Connors? A. I probably omitted it. We are all liable to err, you know. Q. That didn't occur to you? A. As I say, we are all liable to mistakes." The defendant Gray further testified that he also brought against the Connors Brothers Company an action at law which is described briefly in the opinion. Later in the cross-examination the plaintiff offered in evidence certified copies of the record in this action at law, offering to show that the action in question "was that referred to by the witness Gray in his evidence and the suit in which he sought to recover from the Connors Brothers Company the money that he claimed they owed him and that he had previously claimed should be set off against the notes in suit in this case, and in which case the plaintiff offered to show that final judgment had been rendered for the defendant. The defendant objected to the introduction of the record, on the ground that it was immaterial in this case." The judge excluded the record, and the plaintiff excepted.

At the close of the evidence the plaintiff asked the judge to make the following rulings:

"1. On all the evidence the plaintiff is entitled to recover."

"3. If the jury find that there was a consideration for the notes, then their verdict should be for the plaintiff for the sum agreed upon.

"4. Oral evidence cannot be considered by the jury as tending to vary or contradict the legal effect of Gray's indorsement, but is to be considered only in so far as it bears on the question of consideration.

"5. The notes, mortgages and assignments made respectively

in May and November, 1908, were parts of the same two transactions, and it makes no difference on the question of consideration whether Gray or Sullivan got the property, as a consideration moving to either would support the obligation of the other."

The judge refused to make any of these rulings except so far as their substance might be embodied in his charge. The judge concluded his charge as follows:

"If you are satisfied upon all the evidence that Mr. Gray received some beneficial interest in this teaming property and the teaming business in consideration for his signatures to these notes, then your verdict should be for the plaintiff, and your verdict, it is agreed, in that case, should be for the amount of \$2,563.20, plus simple interest reckoned at the rate of six per cent per annum from the date of the writ, which was June 7, 1911, up to to-day, assuming of course that you reach your verdict to-day.

"Unless you are satisfied by a fair preponderance of the evidence that Mr. Gray did receive such a beneficial interest in that business in consideration of his affixing his signatures to these notes, your verdict should be for the defendant."

The plaintiff excepted to "so much of the foregoing charge as failed to make clear to the jury that a valid consideration may have existed which would bind Gray on these notes without the transfer of any property at all to Gray or of any beneficial interest at all in any property to Gray, because it makes no difference whether Gray got any property or whether he got any beneficial interest, if the transaction was done at his request."

The plaintiff further excepted "to any statement contained in the charge to the effect that the Sullivans never promised to pay Gray anything, to the statement contained in the charge that the papers themselves throw no light on the nature of the transaction, and further to the statement that the papers do not state the real transaction."

After a colloquy at the end of the charge, the judge further instructed the jury as follows:

"The plaintiff requests that I should give you the following ruling: If the jury find that it was agreed among Connors and the Sullivans and Gray that either Sullivan or Gray or both of them should get title to the property in consideration of signing and delivering the mortgage and notes, and that either or both of

them did in fact get title to the property, then the jury should find for the plaintiff for the sum agreed upon.

"That I give you, and I call your attention to the fact that it assumes that you must find an agreement to that effect between the Conners Company, the Sullivans and Gray. If you find such an agreement, that either Gray or the Sullivans should get title to the property, you would be warranted in finding a verdict for the plaintiff.

"The plaintiff must satisfy the jury that there was a valid and good consideration between the plaintiff and this defendant for the indorsement on the notes. If Gray's indorsement was given merely for the accommodation of the plaintiff the jury must find for the defendant."

The jury returned a verdict for the defendant Gray; and the plaintiff alleged exceptions.

The case was argued at the bar in December, 1914, before *Rugg, C. J., Braley, Sheldon, De Courcy, & Crosby, JJ.*, and afterwards was submitted on briefs to all the justices constituting the court.

S. E. Qua, for the plaintiff.

J. Burke, for the defendant Gray.

BRALEY, J. The makers and indorser of the notes having been joined as defendants, it is conceded that as to the makers, who have been defaulted, the plaintiff is a holder for value; and it would not avail the indorser who alone defends, that with the plaintiff's knowledge he became bound for their accommodation. *R. L. c. 73, § 46. Neal v. Wilson*, 213 Mass. 336, 337, and cases cited.

While it was unquestioned that, with the accompanying mortgages, the notes were taken by the plaintiff in payment for the transfer of certain personal property to the makers and mortgagors, the evidence as to their business relations and dealings with the indorser, hereinafter referred to as the defendant, both before and after the transactions, is irreconcilable. The testimony of the plaintiff's president and of its counsel, who prepared the papers and at whose office they were executed, tended to show that the defendant had in some form a pecuniary interest in the property or that the property had been transferred to the makers at the defendant's request and he had indorsed to secure the trans-

fer. The jury, if they believed this evidence, would have been warranted in finding a valuable consideration, sufficient to support the defendant's promise. *Hubbard v. Coolidge*, 1 Met. 84. *Warren v. Durfee*, 126 Mass. 338.

But the defendant testified that at the solicitation of the plaintiff's president, and wholly for its convenience and accommodation, he consented to the use of his name as a mere conduit to pass title to the plaintiff of the notes as well as to the property named in the mortgages, with the distinct understanding and agreement that he should incur no personal liability.

"As to third parties, the rights and liabilities of an accommodation party are, in general, the same as those of a party receiving valuable consideration for his signature; but between the accommodation party and the person accommodated there is no such liability, and one who draws or indorses commercial paper for the accommodation of another is not liable on it to him, whatever their apparent relation upon the paper may be." 3 R. C. L. § 336, and cases cited. *Bird v. Daggett*, 97 Mass. 494.

The credibility of the witnesses was for the jury. If they believed the defendant's evidence, or if they found the evidence evenly balanced, there was no consideration shown for his promise and he was entitled to a verdict. *Lockwood v. Twitchell*, 146 Mass. 623. *Warren v. Durfee*, 126 Mass. 338, 341. *Corliss v. Howe*, 11 Gray, 125.

The plaintiff's first, third and fourth requests could not have been given as formulated. The jury were to determine the actual transaction and a verdict for the plaintiff could not have been ordered. The validity of the notes as enforceable contracts against the defendant depended upon proof of a valuable consideration, the absence of which could be shown by parol evidence, with the burden of proof upon the plaintiff to satisfy the jury that the defendant could be held. *Hill v. Whidden*, 158 Mass. 267. *Delano v. Bartlett*, 6 Cush. 364. The first clause of the fifth request, that the notes, mortgages and assignments were part of the same transaction, is sufficiently covered by the instructions; and the remainder of the request, that a consideration moving either to the makers or to the indorser would support the obligation of each, rests upon the plaintiff's theory that the defendant was liable because at his request the plaintiff had transferred title to the

horses and wagons, as the parties understood, to the makers and the defendant, even if the defendant's name did not appear in the bill of sale, or that he had indorsed for their benefit. It could not have been given without directing the attention of the jury to this qualification, and the judge carefully and accurately pointed out the distinction.

The exception taken at the close to so much of the charge as failed to make clear to the jury that a valid consideration may have existed, which would bind the indorser without the transfer of any property or of any beneficial interest in property to him, "because it makes no difference whether Gray got any property or . . . any beneficial interest, if the transaction was done at his request," was not well taken. The charge repeatedly directed the attention of the jury to the respective claims of the parties. They were told plainly that, if the defendant indorsed at the makers' request, he was liable as well as if the plaintiff transferred the property to the makers at his request, or he had a beneficial interest in the property, and what the plaintiff must prove to hold the defendant on his indorsement was defined with sufficient accuracy. See *Arlington National Bank v. Bennett*, 214 Mass. 352, 357; *Doe v. Boston & Worcester Street Railway*, 195 Mass. 168, 172.

The next exception is to certain statements of the judge that the makers never promised to pay the defendant anything, and that the papers themselves threw no light on the questions the jury were to pass upon, or stated the real transaction. It was unquestioned that on the face of the notes the defendant had no defence. But the case was tried, from beginning to end, upon a question of fact, dependent upon extrinsic evidence, whether the contract between the defendant, the makers and the plaintiff was as the plaintiff contended, or whether the defendant acted only at the request and for the benefit of the plaintiff. The nature of the transactions, to which the judge referred and which he directed the jury to consider, as shown by the context, were the questions raised by their respective contentions.

The further request, apparently proffered after the foregoing exceptions had been alleged, rests upon the assumption that there was a mutual agreement and understanding between the makers and the defendant that the makers should take title to the prop-

erty for the benefit of themselves and of the defendant. Although accurate as a statement of the plaintiff's contention, which already had been given, it ignored the defence and the adverse conclusion which the jury might find on all the evidence. The language used by the judge, after reading the request and saying that he gave it, did no more than again to recall to the jury the real question which they must decide, and he repeated that the burden rested upon the plaintiff to satisfy them that its contention as to the consideration was true, but if the indorsement was merely for the plaintiff's accommodation, they must find for the defendant. *Morrison v. Holder*, 214 Mass. 366.

It is settled that portions of a charge cannot be separated and excepted to, where the charge as a whole, as in the present case, sufficiently states the law applicable to the issues which the parties actually tried. *Sayles v. Quinn*, 196 Mass. 492, 496. The failure of the jury to adopt the plaintiff's view cannot be attributed to any fault of the judge and is not an error of law.

A single exception remains to the exclusion of evidence. To impeach the credibility of the defendant as a witness the plaintiff properly was allowed to introduce in evidence the contradictory statements made by him in the bill in equity, to which he had affixed his signature and made oath. *DeMontague v. Bacharach*, 187 Mass. 128. But the record of the judgment in the action at law was inadmissible. The defendant's liability on the notes was not in issue in that case. It was an action to recover a debt alleged to be due from the plaintiff, and in reply to questions of counsel in cross-examination the defendant admitted he had claimed before the action was brought that the debt should be set off against the notes. The plaintiff had the full benefit of this and could ask the jury to draw the inference that the claim of set-off was an admission that he was liable on the notes. The judgment in favor of the defendant which followed the verdict only settled the question there tried. It could not affect the issue in the case at bar, either by estoppel or as an admission. *Maguire v. Pan-American Amusement Co.* 211 Mass. 22, 25, 26.

The plaintiff having failed to show affirmatively any reversible error, the exceptions, in the opinion of a majority of the court, must be overruled.

So ordered.

SUPPLEMENT.

OPINION OF THE JUSTICES TO THE HOUSE OF REPRESENTATIVES.

Under articles 21, 22 of the Amendments to the Constitution, which were adopted in 1857, the provision, that "A census of the legal voters of each city and town, on the first day of May, shall be taken and returned into the office of the secretary of the Commonwealth, on or before the last day of June, in the year one thousand eight hundred and fifty-seven; and a census of the inhabitants of each city and town, in the year one thousand eight hundred and sixty-five, and of every tenth year thereafter," fixes the month in which the enumeration shall be taken only for the year 1857 and not for the year 1865 or for any tenth year thereafter; and accordingly the Legislature may fix the first day of April as the date as of which the State census must be taken in any tenth year following 1865.

It plainly would be within the constitutional power of the Legislature to amend St. 1914, c. 692, by requiring the decennial State census there provided for to be taken as of May 1, 1915, instead of requiring it to be taken as of April 1, 1915.

THE following order was passed by the House of Representatives on March 24, 1915, and on the same day was transmitted to the Justices of the Supreme Judicial Court. On April 1, 1915, the Justices returned the answer which is subjoined.

ORDERED, That the opinion of the Justices of the Supreme Judicial Court be required by the House of Representatives on the following questions of law:

1. If a census of the inhabitants of each city and town of the Commonwealth, and a special enumeration of the legal voters thereof, shall be taken by the bureau of statistics as of the first day of April in the year nineteen hundred and fifteen, as provided by section one of chapter six hundred and ninety-two of the acts of the year nineteen hundred and fourteen, will such census be in conformity with the requirements of Articles XXI and XXII of the Amendments of the Constitution which provide that "A census of the legal voters of each city and town, on the first day of May, shall be taken and returned into the office of

the secretary of the Commonwealth, on or before the last day of June, in the year one thousand eight hundred and fifty-seven; and a census of the inhabitants of each city and town, in the year one thousand eight hundred and sixty-five, and of every tenth year thereafter"?

2. Will an apportionment by the Legislature of the members of the House of Representatives to the several counties and a division of the Commonwealth into senatorial districts based upon an enumeration of legal voters made under the provisions of said chapter six hundred and ninety-two, if otherwise in conformity with the requirements of said Articles XXI and XXII of the Constitution, be rendered illegal because the enumeration of legal voters is made as of the first day of April in the current year?

3. Will a census of the inhabitants of each city and town of the Commonwealth, and a special enumeration of the legal voters thereof, taken in conformity with the provisions of said chapter six hundred and ninety-two, as amended by the accompanying bill, now pending in the House of Representatives, conform with the requirements of said Articles XXI and XXII of the Constitution, so that the same may be made the basis for an apportionment by the Legislature of the members of the House of Representatives to the several counties of the Commonwealth and of a division of the Commonwealth into senatorial districts?

4. These questions of law are important and the opinion of the Justices is required in order to determine whether remedial legislation is necessary to provide for the taking of the decennial census of the current year.

The accompanying bill referred to above was House Bill No. 1919, entitled "An Act relative to the time for taking the decennial census," which provided for the amendment of St. 1914, c. 692, by striking out the word "April" and inserting in place thereof the word "May."

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The order adopted on the twenty-fourth day of March, 1915, a copy of which is hereto annexed, has been received and the following opinion is submitted.

The question presented is whether Articles XXI and XXII of

the Amendments to the Constitution require the State decennial census to be taken as of the first day of May, or whether the exact time within the designated year may be fixed by the General Court. The decisive words of Article XXI are these: "A census of the legal voters of each city and town, on the first day of May, shall be taken and returned into the office of the secretary of the Commonwealth, on or before the last day of June, in the year one thousand eight hundred and fifty-seven; and a census of the inhabitants of each city and town, in the year one thousand eight hundred and sixty-five, and of every tenth year thereafter." Precisely the same words occur in Article XXII of the Amendments.

The natural and ordinary meaning of these words is that the date as of which the enumeration shall be made and when it shall be returned into the office of the secretary of the Commonwealth is defined for the year 1857; but it is not stated for the year 1865 or any subsequent period. No later provision of either article of amendment discloses a different purpose. The apportionment of the representatives to the several counties required by Article XXI must be made by the Legislature "at its first session after the return of each enumeration as aforesaid." The boards of public officers authorized to divide the counties into districts are required to assemble "on the first Tuesday of August next after each assignment of representatives to each county" for the performance of their duties. By Article XXII, "The General Court shall, at its first session after each next preceding special enumeration, divide the Commonwealth into forty districts" for the election of senators. These requirements do not point to any particular or unvarying date for taking the census. Articles XXI and XXII, which were adopted in 1857, supplanted respectively Articles XII and XIII of the Amendments. Those articles by unmistakable language made necessary the taking of each successive decennial census in the month of May. The words of Article XII as to the time when the census should be taken, were these: "A census of the ratable polls, in each city, town, and district of the Commonwealth, on the first day of May, shall be taken and returned into the secretary's office, in such manner as the Legislature shall provide, within the month of May, in the year of our Lord one thousand eight hundred and thirty-seven, and in every tenth year thereafter, in the month of May."

The words of Article XIII are equally unequivocal in designating the month of May and are these: "A census of the inhabitants of each city and town, on the first day of May, shall be taken, and returned into the secretary's office, on or before the last day of June, of the year one thousand eight hundred and forty, and of every tenth year thereafter." The refusal to follow this plain provision of the earlier amendments in adopting the amendment now in force and the use of words naturally conveying a different meaning indicates that the people intended to make a change in this respect. The convention of 1853 included among its constitutional propositions one beginning with these words: "A census of the inhabitants of each city and town in the Commonwealth, on the first day of May in the year one thousand eight hundred and fifty-five, and on the first day of May of each tenth year thereafter, shall be taken and returned into the secretary's office, on or before the last day of the June following the said first day of May in each of said years." Although this with the other propositions of that convention was rejected by the people in November, 1853, its provisions doubtless were familiar to the public men who composed the Legislature of 1856 by which Articles XXI and XXII of the Amendments were first adopted.

If it had been the purpose of the framers of Articles XXI and XXII of the Amendments that each census should be taken during the month of May, it would have been easy to express that purpose in simple and direct phrase so clear that it could not be misunderstood. Three models of apt words in suitable form to convey that meaning were at hand in the existing Articles XII and XIII and the proposition of the convention of 1853. The adoption of words of a contrary import cannot be treated as accidental, but must be construed as manifesting a settled design to alter the provisions of the earlier amendments on this point as to each census following that of 1857. This is in conformity with the true theory of a constitution which is to establish only broad principles and to leave details to be wrought out by the Legislature according to the varying demands of policy and expediency.

It follows that under the constitutional provisions now in force the General Court may fix the first day of April as the date as of which the State census must be taken in any tenth year following 1865.

The first of May was assumed to be the date of the census in *Opinions of the Justices*, 142 Mass. 601, 604, 605, and 157 Mass. 595, 596. But that question was not there presented for determination, and was not discussed. Doubtless no date other than May first was thought of then or at any time until after the passage of statutes fixing the first of April in place of the first of May as the date as of which taxes must be assessed.* The references in those opinions to the first of May are not authorities against the conclusion now reached.

Accordingly the first question is answered "Yes" and the second "No."

Perhaps the third question becomes immaterial in view of the foregoing answers. But plainly it is within the constitutional power of the Legislature to order the census to be taken on the first day of May in the current year and thus change St. 1914, c. 692, requiring it to be taken as of April first.

ARTHUR P. RUGG.

WILLIAM CALEB LORING.

HENRY K. BRALEY.

CHARLES A. DE COURCY.

JOHN C. CROSBY.

EDWARD P. PIERCE.

JAMES B. CARROLL.

OPINION OF THE JUSTICES TO THE SENATE AND HOUSE OF REPRESENTATIVES.

Under c. 1, § 1, art. 4 of the Constitution of the Commonwealth a tax on property must be "proportional and reasonable," while an excise on a commodity need be only "reasonable."

A general property tax, in order to be proportional, must be distributed so that the amount to be raised shall be contributed by the taxpayers according to the taxable real and personal estate of each, and a tax for a local improvement must be apportioned according to the benefit accruing to the several estates from the public expenditure.

A statute, which should undertake to establish a scheme of taxation of money on deposit or at interest and of public and all other stocks, bonds and evidences of indebtedness, by which these kinds of property should be assessed at a certain

* See St. 1909, c. 440, § 1; c. 490, Part I, §§ 15, 23; Part IV, § 27; St. 1913, c. 835, § 503; St. 1914, c. 198.

number of times their annual net income and taxed at a rate uniform for each city or town, while other kinds of property should be assessed for taxation at their market values, would be unconstitutional as an attempt to impose a property tax that would not be proportional.

An attempted imposition of an excise on incomes derived from intangible personal property, including interest on debts of every kind and dividends on shares of stock in corporations, and an exemption of these classes of property from other taxation, would be in substance and effect a tax on the property from which the incomes are derived and consequently would be unconstitutional because it would not be a proportional tax.

The question, whether a tax of two per cent upon the gross income derived from any profession, trade or employment by the exercise of individual industry and ability would be an excise or a property tax, here was not answered, because the order of the Senate and the House of Representatives requiring the opinion of the justices was interpreted not to call for such an answer.

The question, whether shares of the capital stock of foreign corporations and evidences of indebtedness of domestic or foreign corporations, which represent or derive their values directly from tangible property taxable at its *situs*, lawfully may be exempted from taxation, which expressly was left open in the *Opinion of the Justices*, 195 Mass. 607, here was not considered, because such consideration was not necessary.

A statute, which should exempt from taxation shares of stock in foreign corporations and shares of stock, bonds and evidences of indebtedness that derive their value from property otherwise subject to taxation, and should subject the owner of such exempted securities to an excise at a fixed rate upon the face value of the securities, both the exemption from the property tax and the levying of the excise being conditioned upon establishing the existence of certain facts to the satisfaction of the tax commissioner upon the annual registration of such securities with the tax commissioner, would be unconstitutional for the reasons set forth in the *Opinion of the Justices*, 195 Mass. 607.

The question, whether a statute drawn upon the theory of substituting for general taxation based upon the fair cash values of property a general system of taxation founded upon property values ascertained wholly with reference to income would be constitutional, was not presented to the justices and accordingly was not considered.

A statute, by which moneys due to inhabitants of this Commonwealth from non-resident persons and foreign corporations and shares of stock in and all evidences of indebtedness of foreign corporations held by inhabitants of this Commonwealth should be declared to have no *situs* in this Commonwealth for purposes of taxation, and their holders should be subjected to an excise to be levied on the incomes derived therefrom, would be unconstitutional; because the so called excise would be a tax on the income of property and therefore on the property itself and would not be proportional.

THE following joint order was passed by the House of Representatives on March 18, 1915, and by the Senate on March 19, 1915. On March 24, 1915, it was transmitted to the Justices of the Supreme Judicial Court, who on April 12, 1915, returned the answer which is subjoined.

ORDERED, That, in view of the great changes which have taken place in the physical and financial character of intangible personal property since the adoption of the present tax system; of the fact that the present system of taxing such property has ceased to be equitable or proportional as regards the owners of other kinds of property and fails to produce the public revenue which it should produce; of the inequality, inefficiency and disproportionality which arises from the attempt to levy taxes upon all kinds of property at a definite and (within each city or town) uniform percentage of its capital or market value, without regard to the physical differences or to the differences in earning power or income which exist between the various kinds of property; of the fact that no system of administration or enforcement can be devised which will make the actual result of the present system reasonably equal or proportional; and of the fact that during long periods in the history of the Commonwealth tax laws more suitable to present conditions than the present system have been enacted and maintained under a charter or constitutional limitation that taxes upon property shall be proportional, —

ORDERED, That the opinion of the Justices of the Supreme Judicial Court be required by the General Court upon the following important questions of law:

First. Can the General Court, either under the provision of the Constitution authorizing the Legislature to “impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth,” or under any other provision of the Constitution — for the purpose of correcting the inequalities of the statutory tax system now in force, of securing a much needed revenue from certain kinds of property which now pay (as compared with other property) a smaller tax or none at all, of making the tax laws of the Commonwealth more truly equal and proportional than they now are and thus more responsive to the constitutional requirements — enact, as was done under the Province Charter in execution of a tax clause substantially identical with that in the State Constitution, that certain forms of property shall be assessed upon their market value and other forms of property upon a certain number of times their annual value, the total assessments thus reached to be taxed at a rate

uniform for each town or city; provided that the figures or multipliers used be fixed by some State authority, or by the General Court itself, with a view to securing a stricter parity of contribution, having regard to either the capital or the annual value of property and the taxes levied upon it, between the different classes of property and their owners in this Commonwealth than is possible under the present system; and provided that the intent and probable effect of the law is not to discriminate in the matter of taxation against certain forms of property or their owners in favor of the owners of other kinds of property, but that the intent and probable effect of the law is to secure a greater equality of contribution between the owners of different kinds of property, a more truly proportional system of taxation throughout the Commonwealth, a uniform rate in each town or city, and a larger public revenue than is possible under the present law?

Second. Can the General Court, under the provision of the Constitution authorizing it to impose and levy reasonable duties and excises, impose and levy a reasonable duty or excise upon incomes derived from intangible personal property, such as money on deposit or at interest, debts due the taxpayer, public stocks and securities and stocks, bonds, notes or other evidences of indebtedness of corporations, domestic and foreign; and can it also levy at a uniform rate throughout the Commonwealth a reasonable duty or excise upon incomes derived from professions, trades and employments?

Third. Can the General Court

(a) Exempt from taxation such stocks of foreign corporations and such bonds, debentures, bills and notes of domestic or foreign corporations (not already so exempt) as may be proved by the holders thereof to be secured by, to represent or to derive their values directly from, tangible property (not through the holdings of stocks or bonds of other corporations), provided that such tangible property is taxable where it is located; and provided that the tax commissioner does not find that such of said tangible property as may be situated within the Commonwealth is inadequately assessed locally for purposes of taxation; and

(b) Grant to the holders thereof the privilege (subject to the payment of a reasonable excise or duty thereon): first, of establishing the existence of such facts by filing with the tax com-

missioner evidence thereof satisfactory to him; and, having established such facts, second, of procuring the registration of such securities by the tax commissioner to indicate that they are exempt from taxation?

Fourth. Can the General Court under the Constitution provide that moneys due an inhabitant of this Commonwealth from any foreign corporation or any person or persons not residing within the Commonwealth, and all stock, bonds, notes or other evidences of indebtedness issued by foreign corporations and held by inhabitants of this Commonwealth shall have no *situs* within the Commonwealth for purposes of taxation and shall not be taxed under the provisions of Parts I and II of chapter 490 of the Acts of the year 1909? And can the General Court then levy a reasonable duty or excise upon the income derived by inhabitants of the Commonwealth from the foregoing classes of property?

These questions are propounded with a view to legislation as recommended or suggested in the inaugural address of his Excellency the Governor, in a statement of the tax commissioner entitled "The Intent and Operation of the Tax Laws of Massachusetts," Senate document No. 440, and in certain petitions to the General Court, and with special view to certain bills now pending before the Legislature, being Senate documents Nos. 438, 439, 445 and 446, providing for a reform in our tax laws along the lines above suggested. Said message, statement and bills are now under serious consideration by the Legislature, and copies thereof are submitted herewith.

And the Justices are respectfully requested to receive any briefs or arguments upon the validity of either of the measures hereby referred which may be transmitted to them by the joint committee on taxation or by any person.

To the Honorable the Senate and the House of Representatives of the Commonwealth of Massachusetts:

We, the undersigned Justices of the Supreme Judicial Court, having considered the questions stated in the order of the Honorable Senate and House of Representatives transmitted to us on March 24, 1915, respectfully submit the following answers:

The order contains certain recitals of facts. In substance they are that the present system has failed to result in proportional

and reasonable taxation upon the residents of, and the estates lying within, the Commonwealth; and has effected extremely unequal and disproportionate distribution of the burdens of taxation; and that some change is imperatively demanded. These statements are accepted as the conclusions of the members of the General Court touching the administration of the system of taxation established by the statutes of the Commonwealth. It is not within our province to determine whether the evils set forth in the order may be remedied by methods open to the Legislature under the Constitution. Even the facts stated do not warrant a stretching of the Constitution beyond its fair meaning in order to accomplish an end which at present may be regarded as desirable. The Constitution must be interpreted according to the reasonable import of its words. The principles established by it cannot be varied to meet real or fancied exigencies, but must be applied without modification to new conditions as they arise. The Constitution as framed is the only guide. To change its terms is within the power of the people alone. We have not considered the abstract questions in all their aspects, but have treated them as confined to the pending bills, copies of which were transmitted. *Opinion of the Justices*, 217 Mass. 607.

The answers to all these questions depend upon the interpretation of c. 1, § 1, art. 4 of the Constitution of Massachusetts, whereby the General Court is empowered "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same." These words contain the entire grant to tax. They comprehend two general powers, one to lay assessments, rates and taxes upon persons and property, the other to impose duties or excises upon commodities. These two branches of the taxing power are clearly separated. They are different in kind and are expressed in different terms. The power to tax, which includes the power to levy assessments, rates and taxes, relates to persons and property. The power in this respect is not boundless. It is restricted to the extent that it must be "proportional and reasonable." These are words of limi-

tation. Capitation and property taxes must be levied in conformity to this limitation. The significant word in the present connection is "proportional." A general property tax, in order to be proportional, must be divided so that the amount to be raised shall be shared by the taxpayers according to the taxable real and personal estate of each. A tax for a local improvement must be apportioned according to the benefit accruing to the several estates from the public expenditure. While the power to tax includes all persons and all estates within the Commonwealth, and this is most comprehensive, at the same time the restriction to the effect that all taxes must be "proportional" is equally extensive. On the other hand an excise, including thereby both duties and excises, is of a different character. It need not be based on any rule of proportion. It must only be "reasonable." It is a fixed and absolute charge upon the element selected, without reference to the amount of property or the benefit of the taxpayer.

These principles often have been declared. They were set forth clearly a century ago in *Portland Bank v. Apthorp*, 12 Mass. 252. They have been reiterated repeatedly and applied to the varying statutes which have been brought to the test of judicial construction in the intervening hundred years. *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen, 428. *Oliver v. Washington Mills*, 11 Allen, 268. *Commonwealth v. Hamilton Manuf. Co.* 12 Allen, 298. *Cheshire v. County Commissioners*, 118 Mass. 386. *Connecticut Mutual Life Ins. Co. v. Commonwealth*, 133 Mass. 161. *Gleason v. McKay*, 134 Mass. 419. *Northampton v. County Commissioners*, 145 Mass. 108. *Minot v. Winthrop*, 162 Mass. 113. *O'Keeffe v. Somerville*, 190 Mass. 110. *S. S. White Dental Manuf. Co. v. Commonwealth*, 212 Mass. 35. The subject was discussed at length with ample quotations from previous decisions in *Opinion of the Justices*, 195 Mass. 607. It is not necessary now to traverse that general ground again. The present inquiries must be answered in the light of these principles and decisions.

The first question and Senate Document No. 446, to which it refers, relate to a scheme of taxation of money on deposit or at interest, public and all other stocks, bonds and evidences of indebtedness to be assessed at a certain number of times their

annual net income and taxed at a rate uniform for each city or town, the multipliers to be applied to such income to be determined by appropriate public authorities, all for the purpose (as expressly stated in the bill) of avoiding discrimination and inequalities in taxation and of securing a greater equality of contribution to the public charges from the owners of different kinds of property. The multiplier used in the bill is twelve for the income of all such property, unless it is less than four per cent of the market value, when twelve times four per cent is to be used; but the multiplier is subject to readjustment as occasion may require. Of course the declared purpose of the bill must be accepted as true. But an express declaration of legislative purpose to conform to the provisions of the Constitution inserted in a statute does not obviate the necessity of an inquiry into its meaning and effect to ascertain whether in truth its operative features are contrary to the Constitution.

The tax proposed confessedly is a property tax and not an excise. Manifestly all property is not assessed on the same basis. It is not all assessed on market value. Only property excluded from the bill is to be assessed on that footing. The special kinds of property referred to in the bill are not assessed on market value nor yet on income value; but at an arbitrary determination of its income value. The point to be determined is whether a property tax thus assessed is "proportional." It was said in *Oliver v. Washington Mills*, 11 Allen, 268, 275, that in such connection as this the "meaning of the word [proportional] is clear and definite. In relation to those expenses which are called in the Constitution 'the public charges of government,' as distinguished from local expenditures or charges incurred for the benefit of a particular section or locality, the design of the framers of the Constitution was that these, or a portion thereof, should be defrayed by means of taxation; and that in assessing the needful amount it should be laid on property, real and personal, within the Commonwealth, so that, taking 'all the estates lying within the Commonwealth' as one of the elements of proportion, each taxpayer should be obliged to bear only such part of the general burden as the property owned by him bore to the whole sum to be raised. This rule of proportion was based on the obvious and just principle that the benefit which each person derives from the govern-

ment has direct relation to the amount of property which he possesses and enjoys under its sanction and protection. It was to prevent this essential principle from being violated or disregarded, and to render it certain that taxation for general purposes of government should be made equal, that it was expressly provided in the Constitution that a valuation of estates within the Commonwealth should be taken anew decennially at least, and oftener if the Legislature should order." In other words, used in substance by a distinguished lawyer, formerly a justice of this court: A tax is proportional, within the meaning of the Constitution, only when it bears the same ratio to the whole sum raised by taxation as the taxpayer's taxable estate bears to the whole taxable estate of the Commonwealth. See *Provident Institution for Savings v. Boston*, 101 Mass. 575, 577. It was said, *Cheshire v. County Commissioners*, 118 Mass. 386, 389, that the constitutional requirement that taxes be proportional "forbids their imposition upon one class of persons or property at a different rate from that which is applied to other classes, whether that discrimination is effected directly in the assessment or indirectly through arbitrary and unequal methods of valuation." These words were employed in holding unconstitutional a statute which, for the purpose of making a uniform taxation, required reservoirs of water with the necessary dams and underlying lands to be assessed at the same value as land of like quality in the immediate neighborhood, rather than at its fair cash value. In *Opinion of the Justices*, 208 Mass. 616, 618, it was said respecting a proposal to tax personal estate at a uniform rate throughout the Commonwealth: "All kinds of property, unless exempted for good cause, must be taxed alike. It is not permissible to make an assessment at one rate upon real estate and at another rate upon personal property."

It is unnecessary to quote further from decided cases. Any scheme of taxation which aims at equality through means which are not proportional is not valid under the Constitution. The principles are well established and have been adhered to by the court from the beginning. It is obvious that the basic theory of this bill is not in harmony with them. It does not rest the assessment upon any uniform method. It enables the Legislature or a public officer to readjust the multipliers according to a

fluctuating judgment of what may be desirable even to the extent of accomplishing in practice great disproportion. The theory behind the bill would permit manifold classifications of diverse kinds of real as well as personal estate. If extended to its logical conclusions, it would be difficult to trace any remaining constitutional protection to the taxpayer.

Our attention has been called, by one of the learned briefs transmitted to us with the questions, to numerous statutes during the colonial and provincial periods of our history in which a more or less similar principle appears to have been employed. It seems unnecessary to review these in detail. It is enough to say that this practice affords little, if any, guide to that which is authorized by the Constitution. No power was conferred in express words upon the Colony government to levy taxes. In the Province Charter the only power was "to Impose and leavy proportionable and reasonable Assessments Rates and Taxes vpon the Estates and Persons of all and every the Proprietors and Inhabitants," nothing being said about excises. Yet excises were laid in many instances. *Opinion of the Justices*, 196 Mass. 603. The power to tax was greatly restricted by the Constitution. Whatever may be said as to the historical practices touching taxation in the earlier periods, they cannot be regarded as affording ground for breaking away from the plain requirement of the Constitution as to proportional property taxes and the interpretation placed on it by decisions of the court for a hundred years. It is true that in some years after the adoption of the Constitution the Legislature provided that unimproved land should be assessed at a different rate from other property. See, for example, Sts. 1781, c. 16, § 2; 1785, c. 74, § 2; 1805, c. 119, § 3; 1821, c. 107, § 3. This apparent disproportion seems to have continued until the enactment of St. 1828, c. 143, § 1. The validity of this provision does not appear ever to have been tested. Its repeal may have been due to the plain words of Chief Justice Parker, used in 1815 in *Portland Bank v. Apthorp*, 12 Mass. 252, 255: "Taxes must be proportional upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any in-

dividual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the Constitution." Whatever may be the explanation of this comparatively trifling disproportion, it hardly can be regarded as a modification of the Constitution itself or as warranting an interpretation of its words which would be at variance with their clear meaning and contrary to every adjudication touching their effect covering a long period of time. We are constrained to answer the first question in the negative.

The second question has two branches. The first is, whether a duty or excise may be levied upon incomes derived from intangible personal property, including interest on debts of every kind and dividends on corporate stocks; the second refers to an excise upon income derived from professions, trades and employments. The bill to which this question relates, Senate Document No. 438, provides in substance for the assessment of an "excise duty of six per cent of the amount of . . . income arising or accruing during each calendar year" from debts of every description and from stocks of all corporations, domestic or foreign. These classes of personal property are exempted from other taxation, and there are further details as to exemptions and the collection and distribution of the "excise duty." These provisions of the proposed bill constitute a selection of specific articles of property to be assessed by themselves at an unvarying rate, differing from the rate which is assessed upon other property. It is the arbitrary designation of a certain class of property without reference to any rule of proportion and without regard to the relative share of public charges, which it should bear as compared with that borne by other property and without regard to any special benefit accruing to the selected property. Manifestly it is not and does not purport to be a proportional tax. It cannot be sustained as a tax on property, which must be proportional. *Portland Bank v. Apthorp*, 12 Mass. 252, 255. *Cheshire v. County Commissioners*, 118 Mass. 386, 389. *Gleason v. McKay*, 134 Mass. 419, 424. Plainly it is laid as an excise. Such an imposition cannot be sustained under the clause of the Constitution relating to excises. A tax upon income from money on deposit or at interest, from bonds, notes or other debts due, and as dividends from stocks, coupled with exemption from all other taxation of

the principal from which such income flows, is in substance and effect a tax upon the property from which it is derived. A tax upon the income of property is in reality a tax upon the property itself. Income derived from property is also property. Property by income produces its kind, that is, it produces property and not something different. It does not matter what name is employed. The character of the tax cannot be changed by calling it an excise and not a property tax. In its essence a tax upon income derived from property is a tax upon the property. This was decided after most elaborate consideration, with affluent citation of authorities, in *Pollock v. Farmers' Loan & Trust Co.* 157 U. S. 429, 581; S. C. 158 U. S. 601. We do not need to review that ground or to re-state the arguments in its support. It follows that a tax upon such income is a property and not an excise tax. This point is covered also by *Opinion of the Justices*, touching the so called three-mill tax, reported in 195 Mass. 607. We adhere to the principles there stated and to the conclusions there reached. To the same effect see *Opinion of the Justices*, 77 N. H. 000. It is necessary to answer the first branch of this question in the negative.

The second branch of the question refers to that portion of the bill which imposes a tax of two per cent upon the gross income derived from any profession, trade, or employment, after making certain deductions. This, too, is sought to be levied as an excise and not as a property tax. Manifestly this part of the question and the accompanying bill refer to the money received from the exercise of individual industry and ability in profession, trade or employment. An income tax has been a part of our system of taxation from early times. It has been said that Massachusetts is the only State in the Union which firmly established a faculty or income tax as a part of its colonial and provincial revenue system, and has continued it until the present day. The *Income Tax* (Seligman) p. 389. The General Court usually has avoided any doubt as to its being intended to be a property tax by excepting from its operation "incomes derived from property subject to taxation." See St. 1909, c. 490, Part I, § 4, cl. 4. By description it commonly has been included with "personal estate" subject to taxation. The constitutionality of such a tax, when levied proportionally and reasonably, never has been questioned. *Wil-*

cox v. County Commissioners, 103 Mass. 544. In *Melcher v. Boston*, 9 Met. 73, it was treated as a tax which was assessed proportionally and hence was a property tax. It would be unprofitable now to enter upon an historical review of the provincial practice in regard to those taxes. It may be said, however, that as the Province Charter authorized only "proportionable and reasonable Assessments Rates and Taxes" upon estates, and upon persons, income taxation so far as conformable to that charter was a property tax. There is no full and accurate discussion in our decisions (apart from the cases last cited), as to the question whether such a tax upon income is an excise or a property tax. The recital of the difficulties encountered in the administration of the present system of taxation, which prefaces the present order for our opinion, does not refer to income received from profession, trade and employment, and we do not interpret the request as requiring us to answer that part of the question or to discuss those portions of the bill detached from the question and bill as a whole. Thus interpreted it is necessary to answer the second question in the negative and to advise that the proposed bill No. 438 is contrary to the Constitution.

The third question has a double aspect, as has also Senate Document No. 439, to which it relates. The first (a) refers to the subject of exemption and inquires whether the stocks of foreign corporations and evidences of indebtedness of domestic or foreign corporations, which represent or derive their values directly from tangible property, taxable where located, lawfully may be exempted from taxation. This question never has been decided in this Commonwealth. It expressly was left open in *Opinion of the Justices*, 195 Mass. 607. It is not necessary to decide it now. We assume that the proposed bill is presented as a whole, and hence we do not consider this branch of the question apart from its subdivision (b) and the sections of the proposed bill to which it relates.

The second aspect of this question and bill is, whether, as a part of the scheme of exempting stocks of foreign corporations, and stocks, bonds and evidences of indebtedness which derive their value from property otherwise subject to taxation, the owner of such securities may be subjected to an excise tax of a fixed rate upon the value of the securities, both the exemption from the

property tax and the laying of the excise being conditioned upon establishing the existence of certain facts to the satisfaction of the tax commissioner and upon the registration of such securities with the tax commissioner. The bill does not exact a mere registration fee, but an excise based on the face value of the securities. It does not provide for a single registration to continue until there is a change in conditions, but for an annual one, even though the conditions remain the same. The scheme thus outlined is indistinguishable in its essential features from the three-mill tax law, which the Justices, in 195 Mass. 607, advised would be unconstitutional. There is no difference in principle, so far as concerns proportionality or reasonableness, or the underlying distinctions between property and excise taxes, between an absolute exemption coupled with an express imposition of a specific excise by a single legislative enactment on the one hand, and on the other hand an exemption and excise which become operative upon the ascertainment and certification of certain facts by a public officer. This question and bill, when stripped of the machinery by which the result is to be accomplished, aim directly at the exemption of considerable classes of personal estate from the property tax coupled with the imposition of an excise at a fixed rate throughout the State without reference to proportion, in substitution for a property tax upon the same property. It was this in substance which was held impossible by *Opinion of the Justices*, 195 Mass. 607. Briefly stated, the ground is that, even if there is a right to exempt this class of property wholly from taxation, a partial exemption conditional upon the property exempted contributing an arbitrary and disproportional percentage of its value, is not authorized. The mere right to hold and own such property cannot be made the subject of an excise. For the reasons there set forth at length, the third question is answered in the negative.

It is to be observed that neither this nor the preceding question and bill proceed upon the theory of substituting for general taxation based upon fair cash value a general system of taxation founded upon property values ascertained wholly with reference to income. It is not necessary to consider the principles of law which would be involved under such circumstances.

The fourth question in substance is, whether moneys due to

inhabitants of this Commonwealth from non-resident persons and foreign corporations, and stocks and all evidences of indebtedness of such corporations held by inhabitants of this Commonwealth, may be declared to have no *situs* within the Commonwealth for purposes of taxation, and at the same time an excise be levied upon the income derived therefrom. Senate Document No. 445 is a proposed bill embodying such a scheme of taxation. We treat this also as a single proposition and do not consider whether such an exemption, apart from the proposed excise or in combination with different taxation, would be valid. As has been pointed out in answer to the second question, a tax upon the income of property is a tax upon the property itself. Hence, any such tax, however it may be designated, is in truth a property tax and not an excise tax. It is obvious, from the tenor of the question and from the phraseology of the bill, that the tax proposed is levied as an excise and not as a property tax. It does not purport to be in any sense proportional. It follows that for the reasons already stated, this question is answered in the negative.

ARTHUR P. RUGG.
WILLIAM CALEB LORING.
HENRY K. BRALEY.
CHARLES A. DE COURCY.
JOHN C. CROSBY.
EDWARD P. PIERCE.
JAMES B. CARROLL.

OPINION OF THE JUSTICES TO THE SENATE.

A statute, which should prohibit under a heavy penalty a railroad corporation from discharging or disciplining an employee in consequence of information relating to the employee's conduct until such employee shall have been given an opportunity to make a statement in the presence of the person or persons furnishing the information, would be in violation of the Fourteenth Amendment to the Constitution of the United States and of the clauses of the Constitution of this Commonwealth containing similar guaranties of property rights; and such a statute also would be unconstitutional as class legislation creating a special privilege for railroad employees and subjecting railroad corporations to a burden from which other employers would be free. LORING & CROSBY, JJ., stating that, inasmuch as the last mentioned ground of unconstitutionality dis-

posed of all the questions addressed to the justices, they preferred to express no opinion upon the first mentioned ground of unconstitutionality, although not intending to throw any doubt on the opinion of the other justices as to that ground.

THE following order was passed by the Senate on April 23, 1915, and on April 26, 1915, was transmitted to the Justices of the Supreme Judicial Court. On May 3, 1915, the Justices returned the answer which is subjoined.

WHEREAS, There is pending in the Senate a bill printed as Senate Document No. 537, a copy of which is hereto annexed, wherein it is provided that no employee of a railroad corporation shall be disciplined or discharged in consequence of information affecting the employee's conduct until such employee shall have been given an opportunity to make a statement in the presence of the person or persons furnishing the information; now, therefore, be it

ORDERED, That the opinion of the Justices of the Supreme Judicial Court be required by the Senate upon the following important questions of law:

First. Is it within the constitutional power of the General Court to enact legislation limiting the right of railroad corporations to discharge their employees for cause by annexing conditions thereto of the nature above set forth?

Second. Is it within the constitutional power of the General Court to enact legislation of the nature above set forth relative to the employees of railroad corporations giving them as a class privileges not enjoyed by the rest of the community?

Third. Are the provisions of Senate Bill No. 537 constitutional?

To the Honorable Senate of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, having considered the questions propounded by the order of April 23, 1915, a copy of which is hereto annexed, respectfully answer them as follows:

The substance of the proposed statute to which the questions relate is to prohibit, under a heavy penalty, a railroad corporation from discharging an employee by reason of information touching his conduct, until after he has been given an opportunity to make a statement in the presence of the person or persons furnishing the

information. As a corporation can have no first hand observation and can acquire information as to incompetency, inefficiency or wrongful conduct of its employees only through some person, the proposed statute means that such a corporation never can discipline or discharge any of its employees for misconduct, no matter how flagrant, except on his own confession, without giving him a hearing in the presence of the person affording the information, regardless of the fact whether that person is an employee or an entire stranger. Although the title of the bill refers to the "use of detectives," there is no such limitation in the body of the bill. It applies broadly to all persons who may furnish information, whether pure volunteers or others, even though it be wholly beyond the power of the railroad to produce the person furnishing the information and even though that person may be a stranger to the railroad and decline for any reason, or be unable, to confront the employee. The questions have been considered, however, upon the broad principles involved in the proposed bill, and not upon its details.

The Fourteenth Amendment to the Federal Constitution prohibits the several States from depriving "any person of life, liberty, or property, without due process of law." The Supreme Court of the United States is the final authority upon the scope and meaning of these words. That court has said that "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U. S. 578. . . . The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right." *Lochner v. New York*, 198 U. S. 45, 53. In the opinion in *Adair v. United States*, 208 U. S. 161, at pages 174, 175, is found this interpretation: "While . . . the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the function of government — at least in the absence of contract between the parties — to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for

another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé." It was said in *Coppage v. Kansas*, 236 U. S. 1, at page 14: "Included in the right of personal liberty and the right of private property — partaking of the nature of each — is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

In the application of these principles it has been held that the right to liberty and property secured by the Fourteenth Amendment was impaired by a statute which prohibited the discharge of any employee because he was a member of a labor union. *Adair v. United States*, 208 U. S. 161. That decision recently has been reaffirmed in its application to a statute which made unlawful any requirement not to join or remain a member of a labor union as a condition of securing or continuing in employment. *Coppage v. Kansas*, 236 U. S. 1. The ground upon which these decisions rest is that the freedom of contract guaranteed by the Fourteenth Amendment prohibits the imposition of such restraints upon the right of the employer to decline to employ at all, or continue to employ, a person whom he does not desire. It there was said that "the employer must be left at liberty to decide for himself whether such membership by his employé is consistent with the satisfactory performance of the duties of the employment." It seems to us impossible to say that the right of an employer to discharge an employee because of information affecting his conduct in respect of efficiency, honesty, capacity, or in any other particular touching his general usefulness, without first providing a hearing, stands on a different footing or is less under the shield of the Constitution than the right held to be secured in the *Adair* and *Coppage* cases. Our own Constitu-

tion contains in several clauses similar guarantees of the right to acquire, possess and protect property, which doubtless have substantially the same meaning in this respect as has the Fourteenth Amendment to the Federal Constitution. *Opinion of the Justices*, 209 Mass. 607, 612. *Opinion of the Justices*, 211 Mass. 618. It has been held that the right to acquire, possess and protect property secured by our Constitution "includes the right to make reasonable contracts, which shall be under the protection of the law." *Commonwealth v. Perry*, 155 Mass. 117, 121. In the absence of a contract, conspiracy or other unlawful act, the right of the individual employee to leave the service of a railroad without cause, or for any cause, is absolute. The railroad has the correlative right under like circumstances to discharge an employee for any cause or without cause. It is an unreasonable interference with this liberty of contract to require a statement by the employer of the motive for his action in desiring to discharge an employee, as this statute in substance does, and to require him also as a prerequisite to the exercise of his right, to enable the employee to make a statement in the presence of some one else, — a thing which may be beyond the power of the employer. His freedom of contract would be impaired to an unwarrantable degree by the enactment of the proposed statute. The power of the Legislature to require a hearing in connection with the discharge of one employed under the civil service law rests on the authority of the Commonwealth to direct the conduct of its government and that of its political subdivisions. *Opinion of the Justices*, 208 Mass. 619.

Legislation similar to that of the proposed bill has been held unconstitutional in other jurisdictions. *Atchison, Topeka & Santa Fe Railway v. Brown*, 57 Kans. 312. *Wallace v. Georgia, Carolina & Northern Railway*, 94 Ga. 732.

These reasons make it imperative to answer the first question in the negative.

Absolute equality before the law and the equal protection of the laws are principles established by the Constitutions of the United States and of this Commonwealth. *Opinion of the Justices*, 211 Mass. 618. While reasonable classifications may be made by the Legislature in the interests of the public health, public safety and public morals, yet there must be some rational relation be-

tween the object to be attained and the classification, in order that it may not violate the constitutional guaranty that all persons, including corporations, shall be equal in the protection afforded by the laws. Many such classifications have been upheld as not contrary to the principle. See, for example, *Louisville & Nashville Railroad v. Melton*, 218 U. S. 36; *Keokee Consolidated Coke Co. v. Taylor*, 234 U. S. 224. But the proposed bill has no reference to the safety of the travelling public. It applies only to one kind of common carrier and not to others. It imposes a burden upon railroads from which all other common carriers and employers of labor are free. It singles out employees of railroads and confers upon them immunities and advantages enjoyed by no others who work for individuals and corporations, in a particular which has no relation to the kind of employment engaged in by them. In both respects it tends to destroy equality. It creates of railroad employees a specially privileged class, and subjects railroads, as to a matter having no special relation to their business as distinguished from other kinds of business, to obstacles and burdens from which other employers are free. There is strong ground for the conclusion that the selection of railroads as the sole object of severely criminal legislation as to a matter having no particular relation to the management of railroads, would be arbitrary and hence unwarrantable under the Constitution. *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 560. *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150. *Opinion of the Justices*, 163 Mass. 589. We are of opinion that the second question must be answered in the negative.

It is not necessary to consider whether the proposed bill offends against other provisions of the Constitution. For the reasons already stated, the third question must be answered, "No."

ARTHUR P. RUGG.

HENRY K. BRALEY.

CHARLES A. DE COURCY.

EDWARD P. PIERCE.

JAMES B. CARROLL.

We subscribe to the answer given above to the second question. The legislation which is the subject of the first question is confined to the employees of railroad corporations, is open to

the objections set forth in the answer to the second question and is disposed of by them. We do not intend to throw doubt upon the answer to the first question. Upon that matter we express no opinion. But we prefer not to express an opinion on a matter which it is not necessary to consider in answering fully the questions asked.

We subscribe to the answer to the third question.

WILLIAM CALEB LORING.

JOHN C. CROSBY.

INDEX.

ACCORD AND SATISFACTION.

Payment by the guarantor of a balance alleged to be due in an erroneous statement rendered by the creditor to the principal debtor was held under the circumstances to have effected neither a release nor a discharge of the principal debt nor any accord and satisfaction. *Barber Asphalt Paving Co. v. Mullen*, 308.

ACTIONABLE TORT.

In an action for deceit in falsely representing that certain shares of stock in a mining corporation were treasury stock, it was held that the plaintiff by bringing his action for deceit elected to affirm his purchase of the shares, and was bound by the rule of damages that he could recover only the difference between the value of the stock that he got and the value of the treasury stock that he would have got if the defendant's representation had been true, which was nothing at all. *Goodwin v. Dick*, 556.

Therefore, having failed to prove that he suffered damages by the defendant's false statement, he could not recover. *Ibid.*

It was held that at the trial of an action by a woman passenger upon an electric street railway car against the street railway company for personal injuries received in a collision of cars, the evidence of the effect of the impact of the cars, together with the testimony of the plaintiff's physician, tended to show that the plaintiff at the time of the collision suffered a physical injury from without, so that a finding for the plaintiff was warranted. *Megathlin v. Boston Elevated Railway*, 558.

If, in digging a trench in a public way under permission from the board of mayor and aldermen of a city, a gas company's contractor without negligence blasts a ledge which permits water collected in a surface depression on land near the way to flow into the cellar of the owner of other adjoining land, the company has violated no common law right of such owner and is not liable to him in an action of tort for alleged negligence. *MacGinnis v. Marlborough-Hudson Gas Co.* 575.

Whether the provision of R. L. c. 110, § 76, was designed to give to a landowner a cause of action where none existed at common law and to afford compensation for damage necessarily caused by work which is authorized by the statute and is executed in a reasonably proper manner, was not decided in the above case, which was an action of tort for alleged negligence. *Ibid.*

ACT OF GOD.

An act of God, such as will relieve a warehouseman or bailee from liability for damage to or the destruction of goods entrusted to his charge for hire, may be defined as the action of an irresistible physical force not attributable in any degree to the conduct of man and not in reason preventable by human foresight, strength or care. By RUGG, C. J. *Hecht v. Boston Wharf Co.* 397. It cannot be ruled as matter of law that damage to goods stored in sheds of a warehouseman fronting on tidewater, which was caused by an extraordinarily high tide, was the result of an act of God, if the exercise of the ordinary prudence, foresight, care and skill reasonably to have been expected from a warehouseman in the performance of his duty would have prevented the damage. *Ibid.*

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERSE POSSESSION.

If one is put in possession of land under an oral agreement that when he has performed certain services he shall be given a deed of the land and after having performed the services demands the deed, which at first is promised and later is refused, and if this person thereafter continues to occupy the land for more than twenty years, continuously asserting his right of possession and his right to receive a deed, his possession is adverse and he has established a title by limitation against the holder of the record title. *Endicott v. Haviland*, 48.

And if the holder of that title attempts to eject such person adversely in possession and he resists successfully and brings a suit in equity against such holder of the record title to enjoin the threatened eviction, asking also for the specific performance of the agreement to give him a deed, and this suit is dismissed, but he continues his possession under a claim of right, the bringing of the suit in which he has asserted his right of possession does not interrupt the period of his adverse possession or stop the running of the statute of limitations. *Ibid.*

AGENCY.

Existence of Relation.

The authority of an agent cannot be proved by his own statements. *Newburyport Institution for Savings v. Brookline*, 300.

The president of a savings bank has no authority merely by virtue of his office to delegate power to another to write a letter to a town containing offers or admissions as to the value of the bank's interest in a certain path in a town. *Ibid.*

The admission in evidence, at the trial of a petition by a banking corporation against a town for the assessment of damages due to the taking of one half of a path for a public footpath, of a certain letter, written to the chairman of the selectmen of the town before the taking with regard to the town assuming care of the path, was held to have been erroneous, because there was no evidence of authority of its writer to bind the bank. *Ibid.*

In an action of tort for an assault and battery, the record of a suit in equity, brought by the plaintiff against the defendant immediately after the assault in question, in which the trial judge found that "the defendant's servants unjustifiably assaulted the plaintiff" by committing the assault in question, was held to be admissible in evidence and conclusively to establish the fact that an unjustifiable assault was committed upon the plaintiff by a person who at such time was a servant of the defendant. *Coughlin v. Rosen*, 220.

Evidence at the trial of an action by an administrator for the concious suffering and death of his intestate alleged to have been caused by negligence of the defendant, a manufacturing corporation, which was held to warrant a finding that his intestate when injured was in the employ of an electrical expert who was making tests for the defendant as an independent contractor. *Healey v. American Tool & Machine Co.* 236.

At the trial together of two actions, one against a corporation which was a manufacturer of automobiles and the other against a corporation which was the proprietor of a department store to which the first corporation had sold automobile trucks agreeing to furnish with each truck without cost for seven days a chauffeur who would instruct the store corporation's men and to "garage" the trucks for twelve months, for personal injuries caused to a traveller on the highway, it was held that a verdict should be ordered for the store corporation because there was no evidence that the driver was its employee, and that a verdict for the plaintiff was warranted in the action against the automobile corporation. *Tornroos v. R. H. White Co.* 336.

In an action against the lessee of a hotel for injuries sustained by an employee of a subcontractor, when the defendant had taken at least partial possession of the hotel under his lease and was getting it ready to open to the public and the general contractor was putting on the finishing touches, from an elevator operated negligently by one of the defendant's elevator boys descending on the plaintiff as he was working in the elevator well underneath it, it was held that the question whether the negligent elevator boy at the time of the accident was in the employ of the defendant was for the jury. *Gardner v. Copley-Plaza Operating Co.* 372.

Circumstances which were held to furnish no basis for a contention that there was any relation of principal and agent between the lessor and the lessee of a bank building as to the giving to or withholding from the owner of an adjoining estate of a right to make holes for windows in that part of a party wall between the premises which extended above the bank building. *Torrey v. Parker*, 520.

At the trial of an action of tort for deceit practiced upon the plaintiff by an alleged agent of the defendant in negotiations resulting in the sale of timber to the plaintiff, it was held that the evidence presented a question for the jury as to whether the alleged agency existed. *Worcester v. Cook*, 539.

Scope of Authority or Employment.

In an action of tort for an assault and battery, it was held that from certain instructions given by the defendant to his attorney it could be found that the assault with a heavy iron bar was committed by the defendant's servant who accompanied the attorney for the purpose and as a means of obtaining

Agency (continued).

and holding possession of certain premises, and that the servant was acting within the scope of his employment. *Coughlin v. Rosen*, 220.

Where a bank discounted a negotiable promissory note and afterwards it was discovered that before such discounting the cashier had materially altered the note for his own fraudulent purposes, but that no other officer or employee of the bank knew of the fraud, it was held that it could be found that the bank was a holder in due course, the knowledge of the cashier not having been constructive notice to the bank because the cashier was engaged in committing an independent fraudulent act on his own account. *Broadway National Bank of Chelsea v. Heffernan*, 247.

Effect of certain fraudulent acts of a general agent of a life insurance company in alteration of notes and in exceeding the authority conferred upon him by persons who placed incomplete notes and assignments of life insurance policies in his possession in pledge or for use in making pledges. *Towner v. Stanley*, 429; *Munroe v. Stanley*, 438; *Stone v. Sargent*, 445.

An authorization of an attorney by a client to pay such expenses as may be necessary in the conduct of certain litigation does not authorize the payment by the attorney of an execution for costs issued against the client at the termination of the litigation. *French v. Meyer*, 451.

Reimbursement by an attorney at law of the surety on an appeal bond of his client for a payment of costs, which under the circumstances was held to have been a payment made by the attorney as a volunteer which he could not recover from his client because he was not authorized to make the payment in behalf of the client and the client did not promise to reimburse him therefor. *Ibid.*

Ratification.

Failure of the general lessee of a building to disavow an unauthorized lease and covenant for renewal, executed in his behalf by an agent, as soon as he had knowledge of them, and permitting the sublessee to continue his occupancy and the agent to collect the monthly rent in checks made payable to the general lessee, were held to warrant a finding that the general lessee ratified the act of the agent in executing the lease with the covenant for renewal. *Albani v. Evening Traveler Co.* 20.

Fidelity of Agent.

In an action of tort for deceit practiced by an alleged agent of the defendant in negotiations resulting in the sale of standing timber to the plaintiff, upon evidence tending to show that, before the sale, the plaintiff had some talk with the agent about his helping the plaintiff to sell the timber, and that, two or three months after the sale, he paid the agent \$250 "for services in anticipation," it cannot be ruled as a matter of law that the agent was disqualified from acting for the defendant. *Worcester v. Cook*, 539.

When Knowledge of Agent is Notice to Principal.

Knowledge of certain facts by one employed by a corporation publishing a newspaper and called the assistant treasurer of the company, although no such office was recognized by the by-laws, which was held sufficient to support a finding that the corporation had such knowledge as a corporation

can have of the existence of a lease and the covenant to renew made by him in its behalf. *Albani v. Evening Traveler Co.* 20.

Where a bank discounted a negotiable promissory note and afterwards it was discovered that before such discounting the cashier had materially altered the note for his own fraudulent purposes, but that no other officer or employee of the bank knew of the fraud, it was held that it could be found that the bank was a holder in due course, the knowledge of the cashier not having been constructive notice to the bank because the cashier was engaged in committing an independent fraudulent act on his own account. *Broadway National Bank of Chelsea v. Heffernan*, 247.

Independent Contractor.

Evidence at the trial of an action by an administrator for the conscious suffering and death of his intestate alleged to have been caused by negligence of the defendant, a manufacturing corporation, which was held to warrant a finding that his intestate when injured was in the employ of an electrical expert who was making tests for the defendant as an independent contractor and was not in the general nor in the special employ of the defendant. *Healey v. American Tool & Machine Co.* 236.

In an action against the proprietor of a theatre for personal injuries caused by the fall of a staging over the sidewalk in front of the theatre, erected by a painter and his servants, it was held that the defendant was not liable because the painter was an independent contractor and had no control of the servants of the painter. *Regan v. Superb Theatre, Inc.* 259.

Attorney at Law.

See that title.

APPEAL.

See that subtitle under EQUITY PLEADING AND PRACTICE; LAND COURT; PRACTICE, CIVIL; PROBATE COURT; WORKMEN'S COMPENSATION ACT.

ASSAULT AND BATTERY.

In an action of tort for an assault and battery, the record of a suit in equity, brought by the plaintiff against the defendant immediately after the assault in question, in which the trial judge found that "the defendant's servants unjustifiably assaulted the plaintiff" by committing the assault in question, was held to be admissible in evidence and conclusively to establish the fact that an unjustifiable assault was committed upon the plaintiff by a person who at such time was the servant of the defendant. *Coughlin v. Rosen*, 220.

In the same action it was held that from certain instructions given by the defendant to his attorney it could be found that the assault with a heavy iron bar was committed by the defendant's servant who accompanied the attorney for the purpose and as a means of obtaining and holding possession of certain premises, and that the servant was acting within the scope of his employment. *Ibid.*

ASSIGNMENT.

For Benefit of Creditors.

On the facts in evidence and found by the judge at the hearing of a suit in equity by a creditor of one, who had made a common law assignment for the benefit of his creditors, against the assignee to compel him to permit the plaintiff to share in the benefits of the assignment, it was held that, the plaintiff without reason having delayed assenting to the assignment beyond the time set by the instrument of assignment, the suit must be dismissed. *International Trust Co. v. Livermore*, 122.

Under the provisions of an assignment for the benefit of creditors, that the net proceeds of the estate of the assignor shall be distributed in substantial conformity with the "bankruptcy acts of the United States," and that the obligations and liabilities of the assignee are limited to such debts, obligations and liabilities as are provable "against the estates of bankrupts under said bankruptcy acts, and are not entitled to priority under said acts," the assignee need not recognize as a creditor entitled to the benefits of the assignment one, the existence of whose debt, whether liquidated or unliquidated, is contingent at the time of the delivery of the assignment. *Cotting v. Hooper, Lewis & Co. Inc.* 273.

Accordingly, under the provisions of a certain lease of real estate, the lessor was held not to be a creditor entitled to benefit under the assignment, because, at the time of the delivery of the assignment, he had not and could not have made an election as to which of certain privileges given him by the lease he should follow, and therefore his debt was contingent. *Ibid.*

Claims of the lessor or licensor under certain agreements in writing, in the nature of leases or licenses of machinery, for return charges and charges for repairs and cartage were held not to be claims which he had a right to prove against the estate in the hands of the assignee for the benefit of the creditors of the lessee or licensee, because they were not debts "absolutely due" under R. L. c. 163, § 31, at the time of the assignment. *Shaw v. United Shoe Machinery Co.* 486.

Of Insurance Policy.

Rights of the maker of a negotiable promissory note in a policy of insurance upon his life which he had delivered to the payee as security with an instrument of assignment of the policy and of power of attorney, leaving blanks in the instrument where the names of the assignee and the attorney and the amount of the consideration should be written and giving to the pledgee authority to insert therein only his own name and the actual amount of the note, when the pledgee fraudulently altered the note and negotiated it to a holder in due course to whom he also delivered the insurance policy and the instrument of assignment and power of attorney with the blanks filled in with the holder's name. *Tower v. Stanley*, 429.

It was held that such holder in due course of the note might retain the insurance policy as security for the payment of the note by the maker according to its original tenor, the insured being estopped to deny the authority to fill in the blank space for the name of the assignee as it was filled in. *Ibid.*

But if, after the policy and instrument of assignment and of power of attorney have been delivered to such holder in due course, the fraudulent pledgee receives another note from the insured for another loan made to him, he and the insured agreeing that the policy also shall be security for the payment of such additional loan, and the fraudulent pledgee thereupon without authority alters the second note and delivers it to the assignee of the policy, the insured is not estopped to deny the authority of the fraudulent pledgee to make an agreement that the policy should be security for the additional loan and the assignee has no right to retain the policy as security for such second note, either according to its original or according to its altered tenor. *Tower v. Stanley*, 429.

Under the circumstances, one who in good faith received, as security for the payment of a note fraudulently altered, a policy of insurance upon the maker's life and an absolute assignment thereof in which the place for the assignee's name was left blank, was held not to be a purchaser for value of the note and to have no right to hold the policy as security for more than the value of the note according to its original tenor. *Munroe v. Stanley*, 438.

It also was held that the mere fact that, when the insured executed the assignment of his policy and delivered it to the fraudulent person, he left a blank where the name of the assignee should have been written, did not estop him from showing the real authority of the fraudulent person, because the uncompleted notes and assignment were sufficient to put the defendant upon inquiry as to the authority of the person who delivered them to him, and inquiry would have disclosed the fraud. *Ibid*.

Under similar circumstances, where, because of the nature of the payee's fraud, it was held that the policy holder by a suit in equity could compel a redelivery of the note for cancellation, it also was held that he was entitled to a redelivery of the policy and of the assignment without being obliged first to pay any part of what was paid to the agent by the person who received them from the agent. *Stone v. Sargent*, 445.

Of Interest under Will.

A suit in equity may be maintained by a creditor of one having an interest as legatee under a will to enforce an assignment by the legatee to the creditor and to compel the executor of the will to account to him for the amount covered by the assignment although, after notice of and assent to the arrangement, the executor has paid the legatee in full and his final account has been allowed. *Security Bank of New York v. Callahan*, 84.

ATTACHMENT.

Of Freight Cars.

In an action against a foreign railroad corporation, which was an interstate carrier, an attempted attachment by trustee process of freight cars that were the property of the defendant in the possession of a Massachusetts railroad corporation was held to be ineffectual because of the nature of the arrangement between the two corporations as to the cars. *Koontz v. Baltimore & Ohio Railroad*, 285.

Attachment (continued).

It also was held that it was unnecessary to determine whether the attachment was invalid by reason of a failure of the plaintiff to comply with the provisions of R. L. c. 167, § 39, relating to the attachment of railroad cars in use in making regular passages. *Koontz v. Baltimore & Ohio Railroad*, 285.

Dissolution.

St. 1913, c. 305, providing that there should be no dissolution by the death of a debtor of an attachment "upon that part of the property which the debtor had alienated before his decease," which took effect upon its passage, does not apply to a case where, although the death of the debtor occurred after the passage of the statute, the attachment and conveyance both had been made before its passage. *Hanscom v. Malden & Melrose Gas Light Co.* 1.

ATTORNEY AT LAW.

Requirements for Admission to Bar.

Under R. L. c. 165, § 40, as amended by Sts. 1904, c. 355, § 1; 1914, c. 670, Rule 7, made by the board of bar examiners and approved by this court, prescribing certain educational requirements something less in substance than the equivalent of an education in the average high school as a preliminary qualification of applicants for admission to the bar, is not unreasonable nor unduly severe. *Bergeron, petitioner*, 472.

St. 1914, c. 670, amending R. L. c. 165, § 40, as previously amended by St. 1904, c. 355, § 1, whereby the board of bar examiners were authorized to make rules as to the qualifications of applicants for admission to the bar, by providing that such an applicant "shall not be required to be a graduate of any high school, college or university," does not affect Rule 7 of the board of bar examiners, by which a number of ways of satisfying the educational requirements of applicants for admission to the bar other than by being a graduate of a high school, college or university are established. *Ibid.*

Whether St. 1914, c. 670, providing "that an applicant for admission to the bar shall not be required to be a graduate of any high school, college or university," is constitutional, was mentioned as a question that had been adverted to in argument which it was not necessary to determine in the present case and in regard to which authorities in other jurisdictions were not in harmony. *Ibid.*

When the question is presented to this court, whether a rule prescribing the qualifications of applicants for admission to the bar, which was made by the board of bar examiners and was approved by this court under R. L. c. 165, § 40, as amended by St. 1904, c. 355, § 1, is unreasonable and therefore ought not to be enforced, the previous approval of the rule by this court without the benefit of argument raises no presumption in favor of the rule and the question must be considered as if it were presented for the first time. *Ibid.*

Rule 7, made by the bar examiners and approved by this court, provided that it should go into effect at a date three years after the date of its approval, and this was reasonable notice of the enforcement of the rule. *Ibid.*

Scope of Authority.

An authorization of an attorney by a client to pay such expenses as may be necessary in the conduct of certain litigation does not authorize the payment by the attorney of an execution for costs issued against the client at the termination of the litigation. *French v. Meyer*, 451.

Reimbursement.

Reimbursement by an attorney at law of the surety on an appeal bond of his client for a payment of costs, which under the circumstances was held to have been a payment made by the attorney as a volunteer which he could not recover from his client because he was not authorized to make the payment in behalf of the client and the client did not promise to reimburse him therefor. *French v. Meyer*, 451.

Liability for Negligence.

See appropriate subtitle under NEGLIGENCE.

AUTOMOBILE.

In an action on a policy of fire insurance to recover for the loss by fire of an automobile, which was described in the application and the policy by many details, where the defendant contended that the description was wrong in one particular, because the car was of a year other than that stated in the description, and that the policy was invalid, either because the minds of the parties never met in regard to the terms of the policy or, if they did, because the contract was rendered void by the plaintiff's misrepresentation of a material fact, it was held that on conflicting evidence the case properly was submitted to the jury. *Locke v. Royal Ins. Co. Ltd.* 202.

The skidding of the hind wheels of an automobile truck into a gutter when the truck is being operated upon a public highway, so that the truck is caused to capsize and its contents to be injured, is not a "derailment" of the truck within the meaning of that word as used in a policy of insurance of the contents of the truck during transportation "against loss or damage by fire, collision or derailment on land." *Graham v. Ins. Co. of North America*, 230.

Actions for personal injuries resulting from alleged negligence in the use of automobiles, see NEGLIGENCE, *In Use of Automobile*.

AUTREFOIS ACQUIT.

A plea in bar to a complaint for keeping a common nuisance consisting of a tenement resorted to for prostitution during a period named, setting up under R. L. c. 205, § 6, an alleged acquittal upon the same charge, is not sustained by showing that a previous complaint upon a like charge covering a part of the same period was dismissed without a trial. *Commonwealth v. Anderson*, 142.

BAILMENT.

In an action by a woman for the loss of a fur coat which she had delivered to the defendant as a bailee for hire to keep for her in cold storage, certain excuses and conduct of the defendant's employees were held to constitute

Bailment (*continued*).

evidence of the defendant's negligence, on which the plaintiff, who had not agreed to any valuation of her fur coat, could recover the full value of the coat from the defendant if she obtained a verdict. *Cohen v. Henry Siegel Co.* 215.

If the lawful possessor of a dog with the consent of its owner delivers it into the possession of its former owner and no more appears, it cannot be inferred that the purpose of this delivery was to revest the title in the former owner by way of gift, sale or otherwise, and such delivery creates at the highest a gratuitous bailment revocable at the pleasure of the bailor without demand or notice. *Herries v. Bell*, 243.

The lawful bailee of a chattel or domestic animal who had possession of it with the consent of the owner, in an action of tort against one who wrongfully has deprived him of such possession, may recover the full value of the chattel or animal at the time of the conversion. *Ibid.*

Liability of warehouseman, see WAREHOUSEMAN.

BANK.

SAVINGS BANK, see that title.

Where a bank discounted a negotiable promissory note and afterwards it was discovered that before such discounting the cashier had materially altered the note for his own fraudulent purposes, but that no other officer or employee of the bank knew of the fraud, it was held that it could be found that the bank was a holder in due course, the knowledge of the cashier not having been constructive notice to the bank because the cashier was engaged in committing an independent fraudulent act on his own account. *Broadway National Bank of Chelsea v. Heffernan*, 247.

BANKRUPTCY.

What Property passes to Trustee.

The interest of an adopted daughter of a testator under the provisions of a trust created by his will which required that the whole net income of the trust fund should be paid to her quarterly during her life "together with such portion of the principal of said trust fund as shall make the amount to be paid her at least \$3,000 a year during her life, said income to be free from the interference or control of her creditors," is not affected by the adopted daughter being adjudicated a bankrupt. *Boston Safe Deposit & Trust Co. v. Luke*, 484.

Such trustee under the will should pay to her and not to the trustee in bankruptcy of her estate the income of the fund accruing after such adjudication. *Ibid.*

Unlawful Preference.

One who conspired with a creditor of an insolvent person to assist such creditor to receive a preference unlawful under the bankruptcy act of 1898 is liable in a suit in equity brought by the trustee in bankruptcy of such insolvent for the amount of a sum of money collected by him which was a part of such unlawful preference. *Rubenstein v. Lottow*, 156.

In a suit in equity by a trustee in bankruptcy to recover the amount of an alleged unlawful preference by the assignment by the bankrupt to the de-

fendant of certain accounts receivable, where it appears that the assignment was in part for the purpose of enabling the bankrupt to continue in business for a sufficient length of time to prevent the trustee in bankruptcy, when appointed, from avoiding the assignment as a preference, this shows a fraud upon the law which entitles the trustee in bankruptcy to recover the amount of the assignment, in spite of the fact that the bankrupt may have received from the defendant the full value of the accounts assigned so that his estate was not diminished. *Rubenstein v. Lottow*, 156.

In such a suit the defendant cannot be allowed to contend that, if the assignment to him of the accounts receivable thus is to be set aside as in fraud of the law, he is entitled to recover the sums of money paid by him to the bankrupt when the assignment was made; because where one has committed a fraud upon the law he has no standing in court but is left by the law without a remedy in the position in which he put himself. *Ibid.*

It was said, that under the provisions of the bankruptcy act of 1898 for the recovery by the creditors of preferences from the persons who received them, no case had been found in which a third person had been held to be liable to repay the amount of an alleged unlawful preference merely because he was a privy to the payment. *Ibid.*

A trustee in bankruptcy of the estate of a person, who was a member of a partnership until about two months before he was adjudicated a bankrupt, cannot maintain a suit in equity to recover the amount of an alleged unlawful preference where the transfer sought to be avoided was made by the partnership and not by the plaintiff's bankrupt individually, because the assets thus transferred could be recovered only for the creditors of the partnership. *Ibid.*

Where, in a suit in equity by the trustee in bankruptcy of a person for the recovery of the amount of certain accounts alleged to have been transferred as unlawful preferences, it appeared by the record that no attempt was made at the trial to go into the question whether the effect of the transfer of the accounts to the defendant would be to enable any one of the bankrupt's creditors to obtain a greater percentage of his debt than any other creditors of the same class, and that no finding on this issue was made by the judge, it was held that so far as this issue was concerned the case should stand for further hearing and trial. *Ibid.*

Trustee's Rights as to Fraudulent Transfers of Property.

Under the provision of the bankruptcy act of 1898, in § 70 e, no new right of the trustee in bankruptcy is created to avoid transfers of property made by the bankrupt but the statute merely gives him authority to enforce the rights of creditors to avoid fraudulent transfers, if such have been made. *Holbrook v. International Trust Co.* 150.

Whether a particular transfer was or was not fraudulent as to creditors depends on the laws of the State that govern the transfer of the property in question. *Ibid.*

As to when such a transfer may be avoided in this Commonwealth. *Ibid.*

What Debts are Provable.

Claims of the lessor or licensor under certain agreements in writing, in the nature of leases or licenses of machinery, for return charges and charges

Bankruptcy (continued).

for repairs and cartage were held not to be claims which he had a right to prove against the estate in the hands of an assignee for the benefit of the creditors of the lessee or licensee, because they were not debts "absolutely due" under R. L. c. 163, § 31, at the time of the assignment. *Shaw v. United Shoe Machinery Co.* 486.

Compare, also, for a similar decision under the provisions of the national bankruptcy act, *Cotting v. Hooper, Lewis & Co. Inc.* 273.

Disclaimer by Trustee.

Removal, in an action for conversion, of an objection to the plaintiff maintaining the action because previous to the alleged conversion he was adjudicated a bankrupt, by the filing of a disclaimer by the trustee in bankruptcy of the plaintiff's estate. *Greenall v. Herrum*, 278.

Discharge.

A discharge in bankruptcy cannot be taken advantage of as a defence to an action of contract unless it is pleaded. *Herschman v. Justices of the Municipal Court of the City of Boston*, 137.

Circumstances which were held not to relieve a bankrupt from an arrest on an execution issuing on a judgment which resulted from a failure to set up the defence of his discharge in bankruptcy. *Ibid.*

Whether the bankrupt had any remedy either by a petition for a writ of review or by a suit in equity was not determined. *Ibid.*

BAR EXAMINERS.

See ATTORNEY AT LAW.

BILLS AND NOTES.

Incomplete Instrument.

The former rule of common law that, where the maker of a negotiable promissory note when he delivered it left blank spaces therein, he was estopped to deny the authority of a *bona fide* purchaser of the note who in good faith filled in the blanks, was changed by R. L. c. 73, § 31, so that, when such *bona fide* purchaser of the note fills in the blank spaces, the maker is bound by the note only in case the spaces are filled in strictly in accordance with the authority he gave and within a reasonable time. *Tower v. Stanley*, 429.

Application of the foregoing where the note, when it came to the possession of the third person, had been altered fraudulently and had a blank for the name of the payee, in which case it was held that the third person was not a holder of the note in due course, but was put upon inquiry as to the authority for filling in the blank spaces and was not entitled to enforce the note against the maker either in its altered state or, under R. L. c. 73, § 141, according to its original tenor. *Ibid.*

Whether a purchaser for value without notice of fraud, who a year and a half after its original delivery received a promissory note which had been altered fraudulently and which had a blank where the payee's name should be, and in good faith inserted his own name as payee, could be considered a holder in due course entitled to enforce the note under R. L. c. 73, § 141,

according to its original tenor, or whether he was affected with notice so that he could not enforce it for any amount, was not determined in *Munroe v. Stanley*, 438.

If the general agent of an insurance company which is the payee in a note of one of its policy holders, given to secure a loan by it, without the knowledge of the maker fraudulently alters the note by raising its amount and erasing the name of the payee and delivers it with the place for the name of the payee blank to one who pays value for it, such purchaser because of the incomplete state of the instrument is put upon notice of the lack of authority of the agent for his acts and has not the right of recovery upon the note according to its original tenor given to a holder in due course by R. L. c. 73, § 141; and the maker is entitled to have the note delivered to him for cancellation. *Stone v. Sargent*, 445.

Alteration.

The addition upon the face of a negotiable promissory note of the words "with interest at 6%" here was conceded to be a material alteration within the meaning of R. L. c. 73, § 142. *Broadway National Bank of Chelsea v. Heffernan*, 247.

Where a bank discounted a negotiable promissory note and afterwards it was discovered that before such discounting the cashier had materially altered the note for his own fraudulent purposes, but that no other officer or employee of the bank knew of the fraud, it was held that it could be found that the bank was a holder in due course, the knowledge of the cashier not having been constructive notice to the bank because the cashier was engaged in committing an independent fraudulent act on his own account. *Ibid.*

A purchaser for value without notice of fraud of a promissory note given by the maker to an agent of an insurance company to pay premiums upon a policy of the maker and before delivery to the purchaser fraudulently altered by the agent by erasing the company's name as payee and inserting the purchaser's, in a suit in equity against the company and the maker cannot recover upon the note either as altered or according to its original tenor. *Andrews v. Sibley*, 10.

Nor can he recover, on the theory that the maker has been unjustly enriched by having his premiums paid with money wrongfully obtained from him, upon proving that the agent paid such premiums in balancing his own accounts with the company. *Ibid.*

Suits in equity by makers of various notes to be relieved from the results of fraudulent acts of the general agent of an insurance company, to whom the notes were delivered, in altering them and in exceeding his authority as to them. *Tower v. Stanley*, 429; *Munroe v. Stanley*, 438; *Stone v. Sargent*, 445.

Holder in Due Course.

Where a bank discounted a negotiable promissory note and afterwards it was discovered that before such discounting the cashier had materially altered the note for his own fraudulent purposes, but that no other officer or employee of the bank knew of the fraud, it was held that it could be found that the bank was a holder in due course, the knowledge of the cashier not having been constructive notice to the bank because the cashier

was engaged in committing an independent fraudulent act on his own account. *Broadway National Bank of Chelsea v. Heffernan*, 247.

The former rule of common law that, where the maker of a negotiable promissory note when he delivered it left blank spaces therein, he was estopped to deny the authority of a *bona fide* purchaser of the note who in good faith filled in the blanks, was changed by R. L. c. 73, § 31, so that, when such *bona fide* purchaser of the note fills in the blank spaces, the maker is bound by the note only in case the spaces are filled in strictly in accordance with the authority he gave and within a reasonable time. *Tower v. Stanley*, 429.

If the maker of a negotiable promissory note signs it, leaving a blank where the name of the payee should appear, and in good faith delivers it for value to one who is authorized to insert only his own name as payee, and if the person who so receives the note fraudulently alters its amount and either alters the rate of interest or inserts a rate where there was none written and delivers the note, still having a blank space where the payee's name should be written, to a third person who receives it in good faith and gives value for it and then writes in his own name as payee, the note when delivered to the third person is under R. L. c. 73, §§ 25-31, an incomplete instrument. *Ibid.*

Under such circumstances where the third person did not complete the note, as required by § 31, in accordance with the authority given by the maker, he was not a holder of the note in due course, but was put upon inquiry as to the authority for filling in the blank spaces and was not entitled to enforce the note against the maker either in its altered state or, under § 141, according to its original tenor. *Ibid.*

After certain fraudulent alterations by the payee of a negotiable promissory note, one who took it for value and without knowledge or notice of the fraud was held entitled under R. L. c. 73, § 141, to enforce payment of the principal of the note by the maker according to its original tenor. *Ibid.*

And, it appearing that the maker had agreed orally with the payee to pay interest at the rate of five per cent, the indorsee also was allowed to enforce payment of interest at that rate although there originally was no provision as to interest in the note. *Ibid.*

Whether a purchaser for value without notice of fraud who, a year and a half after its original delivery, received a negotiable promissory note which had been altered fraudulently and which had a blank where the payee's name should be, and in good faith inserted his own name as payee, could be considered a holder in due course entitled to enforce the note under R. L. c. 73, § 141, according to its original tenor, or whether he was affected with notice so that he could not enforce it for any amount, was not determined in *Munroe v. Stanley*, 438.

If the general agent of an insurance company which is the payee in a note of one of its policy holders, given to secure a loan by it, without the knowledge of the maker fraudulently alters the note by raising its amount and erasing the name of the payee and delivers it with the place for the name of the payee blank to one who pays value for it, such purchaser because of the incomplete state of the instrument is put upon notice of the lack of authority of the agent for his acts and has not the right of recovery upon the note according to its original tenor given to a holder in due course by R. L. c. 73, § 141; and the maker is entitled to have the note delivered to him for cancellation. *Stone v. Sargent*, 445.

Indorsement by Payee for Accommodation of Indorsee who received Consideration.

If, at the request of a lender of money and wholly for his convenience and accommodation, a person consents to have the title to certain promissory notes and mortgages securing them pass through him as a conduit with the understanding and agreement that he shall incur no personal liability, and if in pursuance of this agreement the notes and mortgages are made to him and he indorses the notes to the lender and transfers the mortgages to him, the lender cannot recover in an action against him as indorser, because in such an action brought by the party accommodated the indorser is free to show the facts in defence. *Connors Brothers Co. v. Sullivan*, 600.

In such an action, where the facts are in dispute, the burden is on the plaintiff to prove that the defendant received a consideration for his indorsement of the notes. *Ibid*.

Note of Religious Society.

Signing of a promissory note, given in the name and behalf of an incorporated religious society to the pastor of the society for back salary, by a majority of the board of deacons, in addition to the signatures of the society's treasurer and clerk, was held under the circumstances to be sufficient to bind the society, and signatures of three subdeacons were held to be immaterial and to have no effect to diminish the binding force of the execution of the note by a majority of the deacons. *Farris v. St. Paul's Baptist Church*, 356.

Recovery of Loss caused to Maker of Check to Non-existent Corporation.

An action of contract for money had and received to the plaintiff's use cannot be maintained against one who received and collected a check drawn by the plaintiff payable to the order of a non-existent corporation and delivered by the plaintiff to a fraudulent person and who in good faith paid over to such fraudulent person the whole proceeds of the check. *Burbank v. Farnham*, 514.

BOSTON.

Mayor.

The power of the mayor of Boston under St. 1909, c. 486, § 14, to remove "any head of a department or member of a board (other than the election commissioners . . .)" is not limited to such officers or members of boards as are not public officers, nor to such as the mayor has power to appoint without confirmation by the city council or the certification of the civil service commission. *Murphy v. Mayor of Boston*, 73.

Removal by the mayor of Boston of the members of the board of appeal of the building department which was upheld. *Ibid*.

City Council.

The Legislature acted within its powers in requiring by St. 1914, c. 630, § 1, that the city council of Boston before January 1, 1915, should make a new division of the city into not less than twenty-four nor more than thirty-six wards with their boundaries so arranged that the wards should contain, as nearly as could be ascertained and as might be consistent with well defined limits to each ward, an equal number of voters. *Fitzgerald v. Mayor of Boston*, 503.

Boston (continued).

The exercise by the city council of Boston of the power given them by the statute described above was administrative or political and was not judicial nor *quasi* judicial in character and therefore was not subject to review upon a writ of certiorari. *Fitzgerald v. Mayor of Boston*, 503.

Board of Appeal of Building Department.

The board of appeal of the building department of the city of Boston are not judicial officers. *Murphy v. Mayor of Boston*, 73.

Removal of them by the mayor under St. 1909, c. 486, § 14, which was upheld. *Ibid.*

Fire Department.

The "fire alarm operating branch" of the Boston fire department are entitled to membership in the corporation, Boston Firemen's Relief Fund. *Fickett v. Boston Firemen's Relief Fund*, 319.

Removal of Heads of Departments or Members of Boards.

A member of the board of appeal of the building department of the city of Boston is a "member of a board" within the meaning of those words as they are used in St. 1909, c. 486, § 14, and under the provisions of that section the mayor may remove any or all of the members of that board by filing with the city clerk a written statement setting forth in detail his specific reasons for such removal. *Murphy v. Mayor of Boston*, 73.

The fact that no provision is made in the above statute for a review of such removal by the mayor is no ground for not giving full effect to such removal when the reason, assigned by the mayor in the written statement filed by him with the city clerk in accordance with the requirements of the statute, is adequate. *Ibid.*

It is an adequate reason for the mayor of Boston to assign in making such removal that such members by certain of their decisions acted contrary to sound public policy by failing to require in the construction of buildings suitable sanitary equipment and sufficient protection to life and property from danger by fire. *Ibid.*

The power of the mayor of Boston under St. 1909, c. 486, § 14, to remove "any head of a department or member of a board (other than the election commissioners . . .)" is not limited to such officers or members of boards as are not public officers, nor to such as the mayor has power to appoint without confirmation by the city council or the certification of the civil service commission. *Ibid.*

BOSTON FIREMEN'S RELIEF FUND.

Under St. 1880, c. 107, as amended by St. 1881, c. 22, St. 1909, c. 308, St. 1911, c. 134, and St. 1913, c. 168, creating and relating to the Boston Firemen's Relief Fund, a corporation, the members of the branch of the Boston fire department known as the "fire alarm operating branch" are entitled to membership and to share in the benefits of the fund. *Fickett v. Boston Firemen's Relief Fund*, 319.

BOSTON POLICE RELIEF ASSOCIATION.

The provision of St. 1882, c. 78, amending the charter of the Boston Police Relief Association by authorizing an extension to retired members of the police force of the benefits to accrue upon the death of its members or of their wives, was permissive and allowed but did not compel the extension of the privilege. *Brown v. Boston Police Relief Association*, 391.

Action by that association, at the same meeting at which it accepted the provision of the statute by amending its by-laws so as to permit those who had retired from the police force to continue their membership in the association, in voting to amend a by-law which formerly had provided that upon the death of the wife of a member the board of directors should cause a certain sum to be paid to the member, so that it read that "the board of directors, with the approval of the finance committee" should do so, was within its power under its charter and by-laws. *Ibid.*

That by-law as thus amended means that the determination of the question whether such benefit shall be paid depends upon the direct affirmative sanction of the finance committee. While the finance committee in exercising the power so given to them would not be justified in acting in a whimsical or capricious manner in refusing sanction to the payment of the benefit, a refusal by them to authorize the payment of that benefit to any members who have retired from the police force is within their powers, and cannot be called whimsical or capricious. *Ibid.*

BRIDGE.

Action for injuries caused by a defective plank walk over a bridge in a railroad yard. *Letchworth v. Boston & Maine Railroad*, 560.

BROMFIELD STREET METHODIST EPISCOPAL CHURCH IN BOSTON.

Whether St. 1892, c. 103, authorizing the trustees of the Bromfield Street Methodist Episcopal Church in Boston to sell and convey the real estate of that church, is susceptible of a construction that would permit a termination by due formalities of the trust on which the property was held before such sale, and whether if the true construction of the statute would permit such a course, the statute in that respect would be a constitutional exercise of legislative power, here were mentioned as questions that had not been presented to the court. *Crawford v. Nies*, 61.

The trustees of the Bromfield Street Methodist Episcopal Church in Boston, who were appointed in 1913 by a decree of the Supreme Judicial Court to hold the property conveyed by the deed of one Jackson to Binney and others in 1806, with the authority to sell the real estate of the church given to such trustees by St. 1892, c. 103, and who sold such real estate for \$400,000, are entitled to hold such proceeds as a trust fund which they are bound to administer according to the trusts established by such deed of Jackson. *Ibid.*

CARRIER.

Of Passengers.

Question, whether a woman who, without objections by the conductor, boarded the running board of a street car while it stood still at its last regular

Carrier (*continued*).

stopping place at the end of its route before it went around a curve to prepare to take passengers for its return trip, was under the circumstances a passenger on the car, was held to be for the jury. *Wheeler v. Boston Elevated Railway*, 298.

See also NEGLIGENCE, *Street Railway*.

Of Goods by Water.

The obligation of a carrier by water to use reasonable promptness in transporting goods delivered to it for that purpose and in notifying the consignee upon their arrival at the port of destination is not affected by the fact that, when the consignor notified the consignee that he had shipped the goods, the consignee wrote to the consignor that he would refuse to accept them. *Ideal Leather Goods Co. v. Eastern Steamship Corp.* 133.

The consignor in such case is under no duty to acquaint the carrier with such expressed intention of the consignee. *Ibid.*

Where a steamship company, which was a common carrier by water, received a case of goods in Boston for shipment to New York, and failed to notify the consignee of the arrival of the goods for a period of three or four months after their shipment, the carrier may be found liable to the consignor either for a breach of the contract of shipment or for a breach of its common law duty as a common carrier of goods by water. *Ibid.*

CENSUS.

The Legislature may fix the first day of April as the date as of which the State census must be taken in any tenth year following 1865, articles 21, 22, of the Amendments to the Constitution, which were adopted in 1857, containing no provision to the contrary. *Opinion of the Justices*, 609.

It plainly would be within the constitutional power of the Legislature to amend St. 1914, c. 692, by requiring the decennial State census there provided for to be taken as of May 1, 1915, instead of requiring it to be taken as of April 1, 1915. *Ibid.*

CERTIORARI.

The exercise by the city council of Boston of the power given them by St. 1914, c. 630, § 1, was administrative or political and was not judicial nor *quasi* judicial in character and therefore was not subject to review upon a writ of certiorari. *Fitzgerald v. Mayor of Boston*, 503.

CHARITY.

The power of the Legislature to terminate a public charitable trust for the support of a well recognized sect of the Christian religion is open to grave doubt. *Crauford v. Nies*, 61.

But there is no doubt of the power of the Legislature to authorize the trustees under such a trust to sell a particular piece of land freed from trusts for the maintenance of a building for religious worship and to hold the proceeds of the sale subject to the terms of the trust. *Ibid.*

A deed of land to trustees to hold it forever in trust and to erect thereon a house of worship "for the use of the members of the Methodist Episcopal Church in the United States of America according to the rules and discipline

which from time to time may be agreed upon and adopted" is a public charitable trust in perpetuity. *Crawford v. Nies*, 61.

CHILD.

See PARENT AND CHILD.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CIVIL SERVICE.

Under St. 1911, c. 624, the Police Court of Somerville has jurisdiction to hear and determine a petition by a captain in the police department of that city for a review of the action of the mayor and aldermen in retiring him from active service and placing him on the pension roll at half pay under St. 1903, c. 428, as amended by St. 1909, c. 188. *Mayor of Somerville v. Justices of the Police Court of Somerville*, 393.

A certain letter, written and signed by the director of public safety of the city of Lawrence and addressed to and served upon a sergeant of police of that city under authority of the provision of the city charter contained in St. 1911, c. 621, Part II, § 43, it was held, fairly might be construed to mean that the writer had decided on the day of its date to reduce the rank of the officer and that the decision would take effect two days later. *O'Brien v. Cadogan*, 578.

If such sergeant of police of the city of Lawrence was entitled to a notice under the provisions of the civil service law contained in Sts. 1904, c. 314, § 2; 1906, c. 210, it was held that a notice of two days was a reasonable one which could be found to have afforded him ample time to ask for a public hearing. *Ibid*.

COMMISSIONERS, COUNTY.

See COUNTY COMMISSIONERS.

CONSPIRACY.

One who conspired with a creditor of an insolvent person to assist such creditor to receive a preference unlawful under the bankruptcy act of 1898 is liable in a suit in equity brought by the trustee in bankruptcy of such insolvent for the amount of a sum of money collected by him which was a part of such unlawful preference. *Rubenstein v. Lottow*, 156.

CONSTITUTIONAL LAW.

Opinion of the Justices.

An opinion of the justices of this court given under c. 3, art. 2 of the Constitution upon the constitutionality of a proposed statute, being purely advisory, is not binding as a precedent, and, when the constitutionality of a similar statute after its enactment is contested before this court in a controversy between the parties to an action, the question is to be treated as an open one. *Woods v. Woburn*, 416.

Taxation.

Under c. 1, § 1, art. 4 of the Constitution of the Commonwealth a tax on property must be "proportional and reasonable," while an excise on a commodity need be only "reasonable." *Opinion of the Justices*, 613.

A general property tax, in order to be proportional, must be distributed so that the amount to be raised shall be contributed by the taxpayers according to the taxable real and personal estate of each, and a tax for a local improvement must be apportioned according to the benefit accruing to the several estates from the public expenditure. *Ibid.*

A statute, which should undertake to establish a scheme of taxation of money on deposit or at interest and of public and all other stocks, bonds and evidences of indebtedness, by which these kinds of property should be assessed at a certain number of times their annual net income and taxed at a rate uniform for each city or town, while other kinds of property should be assessed for taxation at their market values, would be unconstitutional as an attempt to impose a property tax that would not be proportional. *Ibid.*

An attempted imposition of an excise on incomes derived from intangible personal property, including interest on debts of every kind and dividends on shares of stock in corporations, and an exemption of these classes of property from other taxation, would be in substance and effect a tax on the property from which the incomes are derived and consequently would be unconstitutional because it would not be a proportional tax. *Ibid.*

The question, whether a tax of two per cent upon the gross income derived from any profession, trade or employment by the exercise of individual industry and ability would be an excise or a property tax, here was not answered, because the order of the Senate and the House of Representatives requiring the opinion of the justices was interpreted not to call for such an answer. *Ibid.*

The question, whether shares of the capital stock of foreign corporations and evidences of indebtedness of domestic or foreign corporations, which represent or derive their values directly from tangible property taxable at its *situs*, lawfully may be exempted from taxation, which expressly was left open in the Opinion of the Justices, 195 Mass. 607, here was not considered, because such consideration was not necessary. *Ibid.*

A statute, which should exempt from taxation shares of stock in foreign corporations and shares of stock, bonds and evidences of indebtedness that derive their value from property otherwise subject to taxation, and should subject the owner of such exempted securities to an excise at a fixed rate upon the face value of the securities, both the exemption from the property tax and the levying of the excise being conditioned upon establishing the existence of certain facts to the satisfaction of the tax commissioner upon the annual registration of such securities with the tax commissioner, would be unconstitutional. *Ibid.*

The question, whether a statute drawn upon the theory of substituting for general taxation based upon the fair cash values of property a general system of taxation founded upon property values ascertained wholly with reference to income would be constitutional, was not presented to the justices and accordingly was not considered. *Ibid.*

A statute, by which moneys due to inhabitants of this Commonwealth from non-resident persons and foreign corporations and shares of stock in and

all evidences of indebtedness of foreign corporations held by inhabitants of this Commonwealth should be declared to have no *situs* in this Commonwealth for purposes of taxation, and their holders should be subjected to an excise to be levied on the incomes derived therefrom, would be unconstitutional. *Opinion of the Justices*, 613.

Commonwealth as Employer.

The Legislature acting as the representative of the Commonwealth and its governmental subdivisions may determine as an employer the number of hours that shall constitute a day's labor for all those with whom the Commonwealth or any such subdivision makes contracts of employment. *Woods v. Woburn*, 416.

Eminent Domain.

The exercise of the right of the public, gained by the taking of an easement of travel in a street, to construct subways and tunnels for public travel beneath the street a long time after the original laying out of the street, infringes no constitutional right of the owner of the fee to the land. *Peabody v. Boston*, 376.

Census.

It plainly would be within the constitutional power of the Legislature to amend St. 1914, c. 692, by requiring the decennial State census there provided for to be taken as of May 1, 1915, instead of requiring it to be taken as of April 1, 1915. *Opinion of the Justices*, 609.

Vested Rights.

It seems, that, if St. 1913, c. 305, providing that no attachment of property shall be dissolved by the death of the debtor "upon that part of the property which the debtor had alienated before his decease," had contained a provision for its application to cases where the attachment and conveyance had been made before the statute took effect, such provision, if not the whole statute, would have been void as an attempt to transfer a vested property right from one person to another in violation of the Constitution of the Commonwealth and that of the United States. *Hanscom v. Malden & Melrose Gas Light Co.* 1.

The power of the Legislature to terminate a public charitable trust for the support of a well recognized sect of the Christian religion is open to grave doubt. *Crawford v. Nies*, 61.

But there is no doubt of the power of the Legislature to authorize the trustees under such a trust to sell a particular piece of land freed from trusts for the maintenance of a building for religious worship and to hold the proceeds of the sale subject to the terms of the trust. *Ibid.*

It seems, that under the Fourteenth Amendment to the Constitution of the United States the constitutionality of a statute which should undertake to annul a contract of a workman or mechanic to work more than a certain number of hours in a day would be open to grave doubt. *Woods v. Woburn*, 416.

A statute, which should prohibit, under a heavy penalty, a railroad corporation from discharging or disciplining an employee in consequence of informa-

tion relating to the employee's conduct until such employee shall have been given an opportunity to make a statement in the presence of the person or persons furnishing the information, would be unconstitutional. *Opinion of the Justices*, 627.

Class Legislation.

Whether St. 1914, c. 670, providing "that an applicant for admission to the bar shall not be required to be a graduate of any high school, college or university," is constitutional, was mentioned as a question that had been adverted to in argument which it was not necessary to determine in the present case and in regard to which authorities in other jurisdictions were not in harmony. *Bergeron, petitioner*, 472.

A statute, which should prohibit, under a heavy penalty, a railroad corporation from discharging or disciplining an employee in consequence of information relating to the employee's conduct until such employee shall have been given an opportunity to make a statement in the presence of the person or persons furnishing the information, would be unconstitutional. *Opinion of the Justices*, 627.

Delegation of Power by Legislature.

The Legislature acted within its powers in requiring by St. 1914, c. 630, § 1, that the city council of Boston before January 1, 1915, should make a new division of the city into not less than twenty-four nor more than thirty-six wards with their boundaries so arranged that the wards should contain, as nearly as could be ascertained and as might be consistent with well defined limits to each ward, an equal number of voters. *Fitzgerald v. Mayor of Boston*, 503.

CONTRACT.

What constitutes.

In an action on a policy of fire insurance to recover for the loss by fire of an automobile, which was described in the application and the policy by many details, where the defendant contended that the description was wrong in one particular, because the car was of a year other than that stated in the description, and that the policy was invalid, because the minds of the parties never met in regard to the terms of the policy, it was held that on conflicting evidence the case properly was submitted to the jury. *Locks v. Royal Ins. Co. Ltd.* 202.

Reimbursement by an attorney at law of the surety on an appeal bond of his client for a payment of costs, which under the circumstances was held to have been a payment made by the attorney as a volunteer which he could not recover from his client because he was not authorized to make the payment in behalf of the client and the client did not promise to reimburse him therefor. *French v. Meyer*, 451.

Construction.

Where a contract is made for the sale of certain shares of stock with the unqualified agreement that, if at any time the buyer wishes to return the shares, the seller will buy them back from him at the same price, this does

not mean merely that the buyer may return the shares if he is dissatisfied with the purchase, because the agreement to buy back the shares is absolute and the reason of the buyer for wishing to return them is immaterial. *Armstrong v. Orlor*, 112.

A pledge of such shares by the buyer to the seller to secure a loan of money to the buyer is not an election by the buyer to keep the shares and not to insist on the seller's promise to buy them back. *Ibid.*

In an action against a lumber company for the non-performance of a contract to manufacture and furnish certain lumber for delivery on a certain day, where the contract contained a provision that "All contracts are contingent upon strikes, fires, breakage of machinery, perils of navigation and all other causes beyond our control," the destruction of the company's lumber mill by fire which made impossible the performance of the contract in accordance with its terms was held to be a complete defence to the action. *New England Concrete Construction Co. v. Shepard & Morse Lumber Co.* 207.

It also was held that there was no obligation upon the defendant to show that the fire that destroyed the mill was beyond its control, the words "beyond our control" in the clause above quoted referring to the words "other causes" immediately preceding them and not limiting the contingency of fires. *Ibid.*

Upon the construction of an oral agreement between an attorney at law and his client, a reimbursement by an attorney at law of the surety on an appeal bond of his client for a payment of costs was held under the circumstances to have been a payment made by the attorney as a volunteer which he could not recover from his client because he was not authorized to make the payment in behalf of the client and the client did not promise to reimburse him therefor. *French v. Meyer*, 451.

Claims of the lessor or licensor under certain agreements in writing in the nature of leases or license agreements of machinery for return charges and charges for repairs and cartage were held not to be claims which he had a right to prove against the estate in the hands of an assignee for the benefit of the creditors of the lessee or licensee, because they were not debts "absolutely due" under R. L. c. 163, § 31, at the time of the assignment. *Shaw v. United Shoe Machinery Co.* 486.

See a similar result in the construction of certain provisions of a lease of real estate, where the question was, whether a claim of the lessor was provable under the national bankruptcy act at the time of an assignment by the lessee for the benefit of his creditors. *Cotting v. Hooper, Lewis & Co. Inc.* 273.

If a proprietor of coal sheds constructs a spur track on the land of a railroad corporation connecting the main tracks of the railroad with the sheds, and the railroad corporation agrees with such proprietor that in transporting coal for him it will deliver the coal at his sheds, the transportation does not come to an end until the cars are placed on the spur track adjoining the sheds and, until this has been done, in the absence of a special stipulation, no action can be maintained for the freight money, because the contract of transportation has not been performed. *New York, New Haven, & Hartford Railroad v. Porter*, 547.

Construction of leases and of covenants therein, see appropriate subtitles under LANDLORD AND TENANT.

In Writing.

The position on the paper of words written in an order for goods may create such an ambiguity as to render oral evidence admissible to explain the meaning of the instrument. *Waldstein v. Dooskin*, 232.

Application of the foregoing principle in determining the meaning of the words "if desired" in a purchase order, where it was held that it could not be ruled as a matter of law that those words related only to the time of shipment, and that there was enough of doubt and uncertainty as to their meaning to warrant the admission of evidence to explain them and to require the submission of the question of their meaning to the jury. *Ibid.*

If the owner of a house makes a contract in writing with a prospective tenant whereby the prospective tenant agrees to occupy the house for a term of five years, and later the parties modify this contract by an oral agreement by which the prospective tenant agrees to pay \$500 additional in rent, and the tenant enters and occupies for ten months but refuses to pay the additional rent, the statute of frauds is no defence to an action for such additional rent, there being under the circumstances a tenancy at will. *Freedman v. Gordon*, 324.

In the action described above the agreement in writing is admissible in evidence as one of the steps by which the defendant's liability to the plaintiff is established. *Ibid.*

In an action by an indorsee of a promissory note against the payee, the defendant was allowed to show that he indorsed the note solely for the accommodation of the plaintiff. *Conners Brothers Co. v. Sullivan*, 600.

Validity.

In an action for a balance alleged to be due upon the purchase price of certain books, it was held to be no defence that the plaintiff in publishing the books had infringed upon the copyright held by another publisher, because it appeared that the defendant had not been disturbed in his possession of the books and, after the sale of the books to the defendant, the owner of the infringed copyright had brought a suit for such infringement in a United States court against the publisher which was settled by agreement and stipulation. *Edward Thompson Co. v. Pakulski*, 96.

A court of equity, because of the monopoly sought to be established contrary to the provisions of St. 1908, c. 454, § 1, refused to enforce the restriction contained in certain contracts between a corporation issuing trading stamps and books and the merchants of a city and its vicinity by which the merchants agreed not to use trading stamps issued by any other corporation or individual and not to sell the books or stamps to any one. *Merchants Legal Stamp Co. v. Murphy*, 281.

A corporation, which has issued trading stamps under contracts containing restrictions illegal and void under St. 1908, c. 454, § 1, cannot maintain a suit in equity to restrain a person, who with knowledge of the terms of such contracts bought the plaintiff's trading stamps from customers of the plaintiff, from buying and disposing of such stamps, where the defendant is not shown to have engaged in any fraud, deception or unfair competition. *Merchants Legal Stamp Co. v. Scott*, 389.

Whether such corporation can be compelled to redeem such trading stamps that have been acquired in violation of the unenforceable terms of its contracts, here was referred to as a question that was not before the court. *Merchants Legal Stamp Co. v. Scott*, 389.

The provision of St. 1899, c. 344, that eight hours shall constitute a day's work for all laborers, workmen and mechanics employed by or on behalf of any city or town in this Commonwealth that accepts the act, does not make invalid a contract of a fireman of a pumping station of the water department of a city that had accepted the act with the water commissioner of the city to work ten hours each day of the week for \$16 a week. *Woods v. Woburn*, 416.

It seems, that under the Fourteenth Amendment to the Constitution of the United States the constitutionality of a statute which should undertake to annul a contract of a workman or mechanic to work more than a certain number of hours in a day would be open to grave doubt. *Ibid*.

Invalidity of an agreement between a Massachusetts fraternal benefit corporation and a similar foreign corporation attempting a merger of the two corporations on terms which were opposed to statutory provisions of the State of the foreign corporation. *Ulman v. United Order of the Golden Cross*, 422.

Performance and Breach.

In an action for a balance allowed to be due upon the purchase price of certain books, it was held to be no defence that the plaintiff in publishing the books had infringed upon the copyright held by another publisher, because it appeared that the defendant had not been disturbed in his possession of the books and, after the sale of the books to the defendant, the owner of the infringed copyright had brought a suit against the publisher for such infringement in a United States court which was settled by agreement and stipulation. *Edward Thompson Co. v. Pakulski*, 96.

In a suit in equity to enforce the performance of a contract in writing to convey to the plaintiff certain real estate upon the payment by the plaintiff of the purchase money in full by monthly instalments as provided for in the contract, if the plaintiff shows that up to a certain time he had made all the payments required and that, when he tendered to the defendant the amount of an instalment then due, the defendant refused to receive it and conveyed the real estate to a third person, it is not necessary for the plaintiff in order to be entitled to a decree to show that he went through the nugatory act of making any further tender to the defendant. *Noyes v. Bragg*, 106.

Where a contract was made for the sale of certain shares of stock with an agreement that, if at any time the buyer wished to return the shares, the seller would buy them back from him at the same price, in a suit in equity by the buyer to compel the seller to take back the shares at the original price, it was held, that on the facts found by the trial judge the demand to take back the shares, which was made about nine months after the making of the contract, was made within a reasonable time. *Armstrong v. Orler*, 112.

If in such a suit it appears that the buyer pledged the shares to the seller to secure a loan, this is not an election by the buyer to keep the shares and is not a bar to the suit. *Ibid*.

Contract (continued).

Where a steamship company, which was a common carrier by water, received a case of goods in Boston for shipment to New York and failed to notify the consignee of the arrival of the goods for a period of three or four months after their shipment, the carrier may be found liable to the consignor either for a breach of the contract by shipment or for a breach of its common law duty as a common carrier of goods by water. *Ideal Leather Goods Co. v. Eastern Steamship Corp.* 133.

In an action against a lumber company for the non-performance of a contract to manufacture and furnish certain lumber for delivery on a certain day, where the contract contained a provision that "All contracts are contingent upon strikes, fires, breakage of machinery, perils of navigation and all other causes beyond our control," the destruction of the company's lumber mill by fire which made impossible the performance of the contract in accordance with its terms was held to be a complete defence to the action. *New England Concrete Construction Co. v. Shepard & Morse Lumber Co.* 207.

It also was held that there was no obligation upon the defendant to show that the fire that destroyed the mill was beyond its control, the words "beyond our control" in the clause above quoted referring to the words "other causes" immediately preceding them and not limiting the contingency of fires. *Ibid.*

Where a person, who has paid the purchase price for a certain lot of land and is entitled to a deed under a contract in writing, repeatedly waives immediate performance by the seller on account of the absence of necessary parties for a period of twelve years, and then demands a deed which the seller refuses, he has a right to rescind the contract of sale and to recover the purchase money paid by him, the delay in making his final demand for a deed not being due to his own fault, and the statute of limitations not beginning to run until his final demand was refused. *Fletcher v. Storer*, 245.

If a proprietor of coal sheds constructs a spur track on the land of a railroad corporation connecting the main tracks of the railroad with the sheds, and the railroad corporation agrees with such proprietor that in transporting coal for him it will deliver the coal at his sheds, the transportation does not come to an end until the cars are placed on the spur track adjoining the sheds and, until this has been done, in the absence of a special stipulation, no action can be maintained for the freight money, because the contract of transportation has not been performed. *New York, New Haven, & Hartford Railroad v. Porter*, 547.

Suits in equity for specific performance of contracts, see EQUITY JURISDICTION, *Specific Performance*.

Effect of the statute of frauds upon actions or suits for breaches of contracts, see FRAUDS, STATUTE OF.

Rescission.

Where a person, who has paid the purchase price for a certain lot of land and is entitled to a deed under a contract in writing, repeatedly waives immediate performance by the seller on account of the absence of necessary parties for a period of twelve years and then demands a deed which the seller refuses, he has a right to rescind the contract of sale and to recover the

purchase money paid by him, the delay in making his final demand for a deed not being due to his own fault, and the statute of limitations not beginning to run until his final demand was refused. *Fletcher v. Storer*, 245.

Implied.

A purchaser for value without notice of fraud of a promissory note delivered by the maker to the agent of an insurance company in payment of premiums on a policy of the maker and fraudulently altered by the agent by erasing the company's name as payee and substituting the purchaser's, was not allowed to recover in a suit in equity against the maker by showing that the agent paid the maker's premiums to the company in balancing his accounts with it. *Andrews v. Sibley*, 10.

In an action of contract to recover on a *quantum meruit* for work and labor performed by the plaintiff for the defendant, where the plaintiff has testified that the defendant employed him and said to him, "I will pay you well and will satisfy you," if it appears that the plaintiff afterwards did the work required, he has a right to go to the jury, and the fact that the defendant has introduced evidence from which it can be inferred that the contract was a different one from that testified to by the plaintiff in no way deprives the plaintiff of that right. *Leverone v. Leverone*, 149.

At the trial of an action of contract by an architect against a builder upon an account annexed for \$1,500, where it was agreed by the counsel for both parties that "the action be tried without reference to the pleadings and that if the evidence showed that the plaintiff had any rights which were not set forth in the . . . declaration, it would be open to the jury to find for the plaintiff, regardless of the pleadings whether for breach of contract or upon any other ground," it was held that the jury were not compelled to accept all of the plaintiff's testimony as true, even if it was not disputed, and that, upon the evidence and the agreement of counsel, the verdict, which was for \$824, was warranted. *Ramsay v. LeBow*, 227.

Where a person, who has paid the purchase price for a certain lot of land and is entitled to a deed under a contract in writing, repeatedly waives immediate performance by the seller on account of the absence of necessary parties for a period of twelve years, and then demands a deed which the seller refuses, he has a right to rescind the contract of sale and to recover the purchase money paid by him, the delay in making his final demand for a deed not being due to his own fault and the statute of limitations not beginning to run until his final demand was refused. *Fletcher v. Storer*, 245.

A contract in writing, made by a fireman of a pumping station of the water department of a city that had accepted St. 1899, c. 344, with the water commissioner of the city to work ten hours each day of the week for \$16 a week, is a valid and binding one, which is a defence to an action by such fireman against the city to recover on a *quantum meruit* compensation for services as fireman in excess of eight hours a day which he was required to perform by the terms of his contract. *Woods v. Woburn*, 416.

Reimbursement by an attorney at law of the surety on an appeal bond of his client for a payment of costs, which under the circumstances was held to have been a payment made by the attorney as a volunteer which he could not recover from his client because he was not authorized to make the

Contract (continued).

payment in behalf of the client and the client did not promise to reimburse him therefor. *French v. Meyer*, 451.

An action of contract for money had and received to the plaintiff's use cannot be maintained against one who received and collected a check drawn by the plaintiff payable to the order of a non-existent corporation and delivered by the plaintiff to a fraudulent person and who in good faith paid over to such fraudulent person the whole proceeds of the check. *Burbank v. Farnham*, 514.

Of Insurance.

See INSURANCE.

CONVERSION.

If a dog, in response to a whistle of its former owner, leaves its lawful possessor and follows its former owner to his house where the former owner detains the dog against the demand of its lawful possessor, this constitutes a conversion of the dog for which its lawful possessor may maintain an action against its former owner. *Herries v. Bell*, 243.

The lawful bailee of a chattel or domestic animal who had possession of it with the consent of the owner, in an action of tort against one who wrongfully has deprived him of such possession, may recover the full value of the chattel or animal at the time of the conversion. *Ibid.*

Action for the conversion of household goods placed by the plaintiff with the defendant to be stored, the alleged act of conversion being the delivery of the goods to the plaintiff's wife against his orders. *Greenall v. Herrum*, 278.

In the above action, no proof by the plaintiff of a demand by him for the goods and of a refusal by the defendant to deliver them to him before the bringing of the action was necessary, and a verdict for the plaintiff is warranted. *Ibid.*

Removal, in an action for conversion, of an objection to the plaintiff maintaining the action because previous to the alleged conversion he was adjudicated a bankrupt, by the filing of a disclaimer by the trustee in bankruptcy of the plaintiff's estate. *Ibid.*

CORPORATION.

By-laws.

Construction and validity of an amendment to a by-law of the Boston Police Relief Association and of action of the finance committee thereunder in refusing to authorize the payment of a certain benefit to retired members of the police force. *Brown v. Boston Police Relief Association*, 391.

Officers and Agents.

The president of a savings bank has no authority merely by virtue of his office to delegate power to another to write a letter to a town containing offers or admissions as to the value of the bank's interest in a certain path in a town. *Newburyport Institution for Savings v. Brookline*, 300.

Signing of a promissory note, given in the name and behalf of an incorporated religious society to the pastor of the society for back salary, by a majority

of the board of deacons, in addition to the signatures of the society's treasurer and clerk, was held under the circumstances to be sufficient to bind the society, and signatures of three subdeacons were held to be immaterial and to have no effect to diminish the binding force of the execution of the note by a majority of the deacons. *Farris v. St. Paul's Baptist Church*, 356.

Stockholder's Right to inspect Books and Records.

Issuance of a writ of mandamus, upon a petition of a minority stockholder in a "one man" corporation, commanding the corporation and the holder of the majority of the stock, who also was its president and treasurer, to permit the petitioner to examine the corporation books and records. *Butler v. Martin*, 224.

Upon such a petition the fact, that the petitioner's request is connected with a controversy between him and the individual respondent as to an alleged agreement of that respondent to buy back the petitioner's stock, will not prevent the court from issuing the writ to enforce the right of inspection, if it appears that the petitioner is acting in good faith and that his purpose is not hostile to the interests of the corporation. *Ibid.*

A stockholder of a Massachusetts corporation, in availing himself of the privilege given by St. 1903, c. 437, § 30, to inspect the stock and transfer books of the corporation, has a right to have his attorney with him to take part in the inspection, and they have a right to make such written memoranda or copies as they require. *Powelson v. Tennessee Eastern Electric Co.* 380.

Whether one of three persons who hold shares of the capital stock of a Massachusetts corporation solely as trustees under a voting trust, by reason of such ownership and of the fact that he is the owner of a large number of the voting trust receipts, may maintain a bill in equity under St. 1903, c. 437, § 30, to compel the corporation and its officers to allow him to examine its stock and transfer books, was not decided in a case, in which a stockholder in his own right had been allowed to intervene as a party plaintiff. *Ibid.*

Nor was it decided whether a stockholder of a Massachusetts corporation is entitled, under St. 1903, c. 437, § 30, to make such examination irrespective of his motive or purpose in so doing, because, on an inspection of the record, it seemed reasonable to infer that the single justice who heard the case was satisfied that the plaintiff was acting in good faith. *Ibid.*

Minority Stockholders' Rights.

The allegations of a bill in equity by minority stockholders in a Massachusetts corporation against another stockholder, who held the majority of its stock and was alleged to be in control of it, averring fraudulent manipulation by the defendant of a Maine corporation, which the Massachusetts corporation succeeded, in pursuance of a fraudulent purpose to reorganize that corporation in such a way as to gain possession of three fifths of the stock of the reorganized corporation without paying anything therefor, were held to set forth a case where the Massachusetts corporation, for whose benefit the suit was brought, was entitled to relief of some sort, the form of which it was not necessary then to determine. *Keith v. Railway*, 532.

Transfer of Shares.

Independently of St. 1910, c. 171, § 9, the delivery of an unindorsed certificate of shares in the capital stock of a corporation with the intention of making an immediate gift of the shares and the acceptance of the unindorsed certificate by the donee as his property pass to the donee the equitable title to the shares with the right to compel a formal assignment by the donor or by the executor of his will after his death and thereafter a transfer on the books of the corporation. *Herbert v. Simson*, 480.

The provision printed on a certificate of shares in the capital stock of a corporation that the shares are "transferable only on the books of the company" affects only the relation of the shareholder to the corporation and does not affect the rights of a third person having an equitable title to the shares. *Ibid.*

Voting Trust.

Whether one of three persons who hold shares of the capital stock of a Massachusetts corporation solely as trustees under a voting trust, by reason of such ownership and of the fact that he is the owner of a large number of the voting trust receipts, may maintain a bill in equity under St. 1903, c. 437, § 30, to compel the corporation and its officers to allow him to examine its stock transfer books, was not decided in a case, in which a stockholder in his own right had been allowed to intervene as a party plaintiff. *Powelson v. Tennessee Eastern Electric Co.* 380.

Ultra Vires Acts.

Invalidity of an agreement between a Massachusetts fraternal benefit corporation and a similar foreign corporation attempting a merger of the corporations on terms which were opposed to statutory provisions of the State of the foreign corporation. *Ulman v. United Order of the Golden Cross*, 422. St. 1906, c. 372, does not give the Supreme Judicial Court power to enjoin a corporation to which a permit has been granted in due form under St. 1906, c. 421, as amended by St. 1911, c. 423, for the transportation of spirituous and intoxicating liquors into or in a city, from conducting business in accordance with the permit, although the holder of the permit is not "regularly and lawfully conducting a general express business" according to the requirement of the amended § 2 of the statute. *Attorney General v. Lyons*, 536.

Extent of Right to Exclusive Use of Name.

Right of an awning maker, who had formed a corporation with a name which consisted of his own name with the word "Company" added, to which he had transferred his business including the good will, to resume business under his own name after the corporation had passed into the hands of a receiver and to compel a new corporation, which had been formed by purchasers from the receiver of all the former corporation's assets including its "business, good will and trade names," to refrain from the use of his name. *C. H. Batchelder & Co. Inc. v. Batchelder*, 42.

In the provision of R. L. c. 72, § 5, in regard to the use in business of the name of a person by "a person who carries on business in this Commonwealth," the word "person" in the phrase quoted includes a corporation, although

§ 5 is not named in the sections enumerated in § 1 of the same chapter in which the word "person" includes "corporation." *C. H. Batchelder & Co. Inc. v. Batchelder*, 42.

Corporate Knowledge.

Knowledge of certain facts by one employed by a corporation publishing a newspaper and called the assistant treasurer of the company, although no such office was recognized by the by-laws, which was held sufficient to support a finding that the corporation had such knowledge as a corporation can have of the existence of a lease and the covenant to renew made by him in its behalf. *Albani v. Evening Traveler Co.* 20.

Knowledge by a fraudulent cashier of a bank which was held not to be constructive notice to the bank. *Broadway National Bank of Chelsea v. Heffernan*, 247.

Corporation a "Person."

Corporation is a "person" and within the provisions of R. L. c. 72, § 5. *C. H. Batchelder & Co. Inc. v. Batchelder*, 42.

Filing Fees.

Two votes of a business corporation at a stockholders' meeting, amending its articles of incorporation, one providing for a reduction of the authorized common stock and the other for an issue of new common stock, which, it appeared, constituted one transaction resulting in a net reduction in the authorized capital stock of the corporation, so that the corporation was not required under St. 1903, c. 437, §§ 41-43, 89, to pay a fee upon the new issue of common stock. *Commonwealth v. United States Worsted Co.* 183.

In reaching the above result, it was held that it did not matter whether or not § 40 authorized the corporation to convert its outstanding preferred stock into common stock. *Ibid.*

Incorporated Religious Society.

See RELIGIOUS SOCIETY.

Foreign.

In an action against a foreign railroad corporation, which was an interstate carrier, an attempted attachment by trustee process of freight cars that were the property of the defendant in the possession of a Massachusetts railroad corporation was held to be ineffectual because of the nature of the arrangement between the two corporations as to the cars. *Koontz v. Baltimore & Ohio Railroad*, 285.

It also was held that it was unnecessary to determine whether the attachment was invalid by reason of a failure of the plaintiff to comply with the provisions of R. L. c. 167, § 39, relating to the attachment of railroad cars in use in making regular passages. *Ibid.*

In an action against a foreign railroad corporation begun by trustee process, if there has been no personal service on the defendant and no direct attachment of property of the defendant, a valid judgment can be entered only against the property attached by trustee process, and, if the alleged trustee is not chargeable, the case must be dismissed. *Ibid.*

Municipal Corporations.

See that title.

COUNTY COMMISSIONERS.

A narrowing by a railroad company of a public highway two rods in width by the construction and maintenance of a fence twelve feet within one of its side lines at a point where the railroad passes under the way may be found to constitute an obstruction of the way, the existence of which it was exclusively within the province of the county commissioners to determine in proceedings under R. L. c. 111, § 132. *New York Central & Hudson River Railroad v. County Commissioners*, 569.

Upon the evidence before county commissioners on a petition of the selectmen of a town under R. L. c. 111, § 132, seeking an order that an alleged obstruction of a public way at a point where a railroad passed beneath it be stopped, and upon findings of the commissioners, it was held that a determination by them that a fence constructed by the railroad company in 1882 twelve feet within the westerly boundary of the way was an obstruction to the way was not contrary to the provision of R. L. c. 53, § 1, disclosed no error of law and was conclusive. *Ibid.*

Order of the county commissioners upon such a petition, which was held to be an order for "repairs" under R. L. c. 111, § 132, and not an order for an "alteration" under § 134. *Ibid.*

COVENANT.

See appropriate subtitle under LANDLORD AND TENANT.

DAMAGES.

For Property taken or impaired under Statutory Authority.

At the trial of a petition against the town of Brookline for the assessment of damages due to the taking of one half of a path, which was subject to an easement of use "for all the purposes for which such passageways now are or at any time hereafter may be commonly used in said town of Brookline," evidence was held to be admissible, for the purpose of proving that no greater servitude existed after than before the taking, of all the physical uses made of similar paths in Brookline, irrespective of the provisions of the deeds, instruments or public acts which created them. *Newburyport Institution for Savings v. Brookline*, 300.

The admission in evidence, at the trial of a petition by a banking corporation against a town for the assessment of damages due to the taking of one half of a path for a public footpath, of a certain letter, written to the chairman of the selectmen of the town before the taking with regard to the town assuming care of the path, was held to have been erroneous, because there was no evidence of authority of its writer to bind the bank. *Ibid.*

The owner of land beneath a public street has a right to use such land in any way not inconsistent with the public easement of travel; but, even a long time after the street originally was laid out, the public, without paying to the landowner any compensation beyond what he was paid when the street was laid out, may construct a subway or tunnel beneath the street for the

purposes of travel although thereby the owner is deprived of all use of the land. *Peabody v. Boston*, 376.

Neither at common law nor by St. 1902, c. 534, § 8, has the owner of land on Washington Street in Boston, where none of his land was taken, any right of compensation for damage caused by the building of the Washington Street tunnel in the half of the street of which he owned the fee subject to the public easement of travel, although he was caused expense by being required to remove boilers and other structures placed by him beneath the street and was deprived of further use of his land beneath the street. *Ibid.* Upon a petition for the assessment of damages for property taken for a public purpose under statutory authority, the jury may consider any and all uses to which the property could be appropriated properly, and the determination whether any use to which it is testified that it could be put is too indefinite and prospective to be considered by the jury is largely within the discretion of the presiding judge. *Wellington v. Cambridge*, 312.

Upon a petition for the assessment of damages for the taking by a city under statutory authority of a wharf and a portion of an adjoining dock and certain easements in the dock belonging to the petitioner, the petitioner was entitled to recover the value of a right, gained by prescription, to have the forward hatches of vessels unloading coal at his wharf overlap the adjoining wharf by more than two thirds of the vessels' length. *Ibid.*

It was held that, at the trial of such petition, it was within the discretion of the presiding judge to admit evidence offered by the petitioner as to the estimated annual cost of trimming coal between the forward and middle hatches to the rear hatch of the coal barges before they could be unloaded and to show that because of the loss of time thus caused the petitioner also would lose the premium paid by the transportation companies for the speedy discharge of cargoes. *Ibid.*

Certain illustrations used in his charge by the judge presiding at such trial to illustrate the nature of the special and peculiar damage alleged to have been sustained by the petitioner, which were held to have been proper. *Ibid.*

Effect, at the trial of a petition against a city for the assessment by a jury of damages sustained by the taking of an easement in land of the petitioner for the construction and maintenance of a water conduit, of the fact that, previous to the taking, the city as a trespasser had entered upon the petitioner's land and had constructed the conduit. *Perley v. Cambridge*, 507.

At the trial of a petition for the assessment of damages for land taken under St. 1908, c. 571, for the Mount Everett State Reservation, where the value of the land was chiefly sentimental "as a sight seeing place," it was held to be within the discretionary power of the presiding judge to exclude evidence of the value of a parcel of land on the other side of the mountain without value as a mere sight seeing place but with value because of its wood and timber and because of its connection with other properties. *Macnaughtan v. Commonwealth*, 550.

At the same trial it was within the discretionary power of the presiding judge to exclude evidence of the price paid for the land taken under an option, which was procured, by one who afterwards became a member of the commission in charge of the reservation and conveyed the land to the Commonwealth, for the purpose of showing to the Legislature the price for which the land could be bought. *Ibid.*

Damages (*continued*).

If, in digging a trench in a public way under permission from the board of mayor and aldermen of a city, a gas company's contractor without negligence blasts a ledge which permits water collected in a surface depression on land near the way to flow into the cellar of the owner of other adjacent land, the company has violated no common law right of such owner and is not liable to him in an action of tort for alleged negligence. *MacGinnis v. Marlborough-Hudson Gas Co.* 575.

Whether the provision of R. L. c. 110, § 76, was designed to give to a landowner a cause of action where none existed at common law and to afford compensation for damage necessarily caused by work which is authorized by the statute and is executed in a reasonably proper manner, was not decided in an action of tort for alleged negligence. *Ibid.*

Upon a petition for the assessment of damages sustained from the laying out as a public highway of a private street adjoining the petitioner's land and changing its grade, it is proper to base the damages upon the assumption that the street will be completed to the grade established by the order for its laying out, and the damages are not to be limited to the effect of the change of grade that exists at the time of the trial after a temporary suspension of the work on the street. *Wooley v. Fall River*, 584.

In such a case it is proper for the presiding judge to permit the jury to consider evidence of the cost of raising the petitioner's house and of filling and raising the grade of the petitioner's land or of a part of it, if the jury first find that to raise the house and raise the land is a reasonable, economical, proper and advantageous way of treating the property in the situation that will exist when the street shall have been raised to the grade established by the order. *Ibid.*

At the same trial it is proper for the presiding judge to permit the petitioner to testify as to what he considers was the fair market value of the land immediately before the order for the laying out of the street, such an owner being assumed to have a knowledge of his property adequate to form an intelligent estimate of its value. *Ibid.*

And at the trial of such a petition, the presiding judge in his discretion properly may permit the introduction in evidence of a photograph of the land taken about fifteen years before the trial by the petitioner, who had lived on the land off and on for sixteen years and who testified that "no one ever touched the street until the city accepted it." *Ibid.*

Indemnity for Loss or Expense due to Abandoned or Void Taking.

In that part of R. L. c. 48, § 69, which provides for an indemnity to a person who has suffered loss or been put to expense by reason of proceedings relating to the taking of land for a town way or a private way, and which by § 94 of the same chapter is made applicable to takings for similar purposes by a city, the substitution of the word "loss" for the word "trouble," which was used in the earlier revisions, did not change any of the elements of damage which are recoverable and which were defined in *Whitney v. Lynn*, 122 Mass. 338. *Munroe v. Woburn*, 116.

An owner of land was held not to be entitled to recover, in a petition under R. L. c. 48, §§ 69, 94, loss of rentals which he would have received from a building which he had planned to erect but which, because of a taking for a street widening, he had been compelled to abandon, loss by reason of inability,

caused by the taking, to make an advantageous sale of the property, amounts paid to architects for changes in building plans and amounts paid as taxes during that period either upon the whole lot or upon the portion included in the taking. *Munroe v. Woburn*, 116.

At the trial of such a petition, it was proper for the judge to refuse to permit the petitioner to be asked, "What do you consider that your loss has been by the action of the city council in taking this land?" and to refuse to permit a qualified expert, testifying for the petitioner, to be asked, "What is your estimate of the loss to the petitioner by the action of the city council in that taking?" *Ibid.*

For Breach of Contract.

In a suit in equity, in determining the equivalent in money of the plaintiff's right to a renewal of a lease of a barber's shop in which he carried on a thriving and increasing business, the plaintiff's testimony may furnish some basis for determining the profits of his business, although no books of account were kept. *Albani v. Evening Traveler Co.* 20.

In Tort.

The lawful bailee of a chattel or domestic animal who had possession of it with the consent of the owner, in an action of tort against one who wrongfully has deprived him of such possession, may recover the full value of the chattel or animal at the time of the conversion. *Herries v. Bell*, 243.

It was held that at the trial of an action by a woman passenger upon an electric street railway car against the street railway company for personal injuries received in a collision of cars, the evidence of the effect of the impact of the cars, together with the testimony of the plaintiff's physician, tended to show that the plaintiff at the time of the collision suffered a physical injury from without, so that a finding for the plaintiff was warranted. *Megathlin v. Boston Elevated Railway*, 558.

In an action for deceit in falsely representing that certain shares of stock in a mining corporation were treasury stock, it was held that the plaintiff by bringing his action for deceit elected to affirm his purchase of the shares and was bound by the rule of damages that he could recover only the difference between the value of the stock that he got and the value of the treasury stock that he would have got if the defendant's representation had been true, which was nothing at all. *Goodwin v. Dick*, 556.

Therefore, having failed to prove that he suffered damages by the defendant's false statement, he could not recover. *Ibid.*

In Equity.

In a suit in equity, in determining the equivalent in money of the plaintiff's right to a renewal of a lease of a barber's shop in which he carried on a thriving and increasing business, the plaintiff's testimony may furnish some basis for determining the profits of his business, although no books of account were kept. *Albani v. Evening Traveler Co.* 20.

Excessive.

On an exception to the refusal of a judge, who presided at the trial of an action of tort for personal injuries, to set aside a verdict for the plaintiff on

Damages (continued).

the ground that the damages were excessive, the question for this court is whether the judge in denying the motion abused his discretion, and to sustain the exception it is necessary to decide that the judge could not have taken honestly the view taken by him. *Ogden v. Aspinwall*, 100.

DANGEROUS ARTICLE OF MERCHANDISE.

On the evidence, it was held that a verdict for the plaintiff was warranted in an action against a manufacturer of and dealer in paints, oils, varnishes and oil stains by the wife of a purchaser of "walnut oil stain" for personal injuries caused by the ignition of the stain, while the plaintiff's husband was painting a floor with it, due to its being composed largely of volatile and inflammable ingredients. *Thornhill v. Carpenter-Morton Co.* 593.

DEATH.

It was held that, upon the evidence, a finding was warranted that the injury, which caused the death of a workman who, when already subject to an affection of the valves of the heart, suddenly fell to the ground while engaged in heavy lifting and died of heart disease after about five minutes of unconsciousness, arose out of and in the course of his employment. *Fisher's Case*, 581.

Other cases where compensation was awarded under workmen's compensation act for death, see *Brightman's Case*, 17; *Sponatski's Case*, 526.

Such compensation was not awarded in *King's Case*, 290.

Dissolution of attachment by death, see ATTACHMENT, *Dissolution*.

Actions for death caused by negligence, see NEGLIGENCE, *Causing Death*.

DECEIT.

On evidence at the trial of an action of tort for deceit alleged to have been practiced upon the plaintiff by an agent of the defendant to induce him to purchase the standing timber on certain lots of land of the defendant, tending to show that one could not determine by inspection how many acres of standing timber there were in the tract on account of the character of the timber and the configuration of the lots, and that the agent made false statements which reasonably were understood by the plaintiff to mean that an actual survey had been made of the lots and that they contained about ninety acres, whereas they contained only sixty-five acres, it was held that it could not be ruled as a matter of law that the false representations were not actionable, and that a finding was warranted that the plaintiff acted reasonably in relying on the agent's statements and that the statements were untrue. *Worcester v. Cook*, 539.

It was held that the evidence at such trial presented a question for the jury as to whether the alleged agency existed. *Ibid.*

In such action upon evidence tending to show that, before the sale, the plaintiff had some talk with the agent about his helping the plaintiff to sell the timber, and that, two or three months after the sale, he paid the agent \$250 "for services in anticipation," it cannot be ruled as a matter of law that the agent was disqualified from acting for the defendant. *Ibid.*

In an action by a stockbroker against another stockbroker for false and fraudulent representations that certain shares of mining stock offered for sale

were treasury stock, whereby the plaintiff was induced to purchase some of the shares and suffered loss, it was held that it was right for the presiding judge to order a verdict for the defendant because it appeared that the mining stock not only was worthless but that it would have been equally worthless if the shares had been treasury stock. *Goodwin v. Dick*, 556.

In such case, the plaintiff by bringing his action for deceit elected to affirm his purchase of the shares and was bound by the rule of damages that he could recover only the difference between the value of the stock that he got and the value of the treasury stock that he would have got if the defendant's representation had been true, which was nothing at all. *Ibid*.

Therefore, having failed to prove that he suffered damage by the defendant's false statement, he could not recover. *Ibid*.

DEED.

A blank space left in one corner of a large plan, upon which streets were designated and blocks of building lots were marked out, was held not necessarily to show an intention, in a deed conveying the house lots on the line of the extension of a street opposite the open space which was made by a grantor who also owned the open space and referred to the plan, that this land should be left open or should be added to the width of the street. *Hobart v. Toule*, 293.

It accordingly was held that it properly could be found that by the reference to the plan in the deed no easement in the strip was created by grant or implication for the benefit of the lots of land on the opposite side of the extension of the street fifty feet wide. *Ibid*.

Recitals in deeds as admissions, see *Reed v. Mayo*, 565.

DEVISE AND LEGACY.

Vested Interests.

Construction of a will by which the income of a trust was given to the testator's widow and a daughter "during their joint lives," "and upon the death of both my said wife and daughter said real, personal or mixed estate shall revert to my next of kin, the persons would have been rightfully entitled to the same had I died intestate," from which it was held that the testator's widow and daughter were his next of kin as defined in this clause and each took at the death of the testator a vested remainder in the property, subject to the life estates. *Ford v. Ford*, 322.

And it therefore was held further that upon the death of the widow intestate the daughter inherited her mother's vested interest and became the absolute owner of the entire estate, and that consequently in a suit in equity she was entitled to a decree declaring the trust to have been terminated and ordering the trustee to transfer and convey the entire property to her. *Ibid*.

It also was held that the use of the word "revert" in such will did not affect the testator's gift of the vested remainders to those who would have inherited his estate had he died intestate. *Ibid*.

As to when certain interests vested under a certain trust, see *Upham v. Parker*, 454.

Construction of Inconsistent Words.

Where an absolute estate is given by a paragraph of a will in clear and unmistakable language, it cannot be cut down to a less estate by subsequent words in the same paragraph inconsistent therewith. Such subsequent words are treated as of no effect. *Sherburne v. Little*, 385.

Trusts.

Construction of provisions in wills as to trusts, see TRUST, *Construction*.

DISTRICT COURT.

See POLICE, DISTRICT AND MUNICIPAL COURTS.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOCK.

The owner of a wharf adjoining a private dock was held to have acquired by prescription the right to have the forward hatches of vessels unloading coal at his wharf overlap the adjoining wharf by more than two thirds of the vessels' length without interfering with any right of the public in navigable waters. *Wellington v. Cambridge*, 312.

Therefore, when such owner's wharf and his interest in the dock were taken by a city under statutory authority for the construction of a bridge, he became entitled to have included in his damages compensation for his right to overlap the adjoining wharf when unloading vessels. *Ibid*.

Evidence admissible to prove the damages suffered when the dock was so taken. *Ibid*.

DOG.

The gift of a dog voluntarily delivered to the donee on the Lord's day is valid. *Herries v. Bell*, 243.

If a dog, in response to a whistle of its former owner, leaves its lawful possessor and follows its former owner to his house where the former owner detains the dog against the demand of its lawful possessor, this constitutes a conversion of the dog for which its lawful possessor may maintain an action against its former owner. *Ibid*.

If the lawful owner of a dog with the consent of its owner delivers it into the possession of its former owner and no more appears, it cannot be inferred that the purpose of this delivery was to revest the title in the former owner by way of gift, sale or otherwise, and such delivery creates at the highest a gratuitous bailment revocable at the pleasure of the bailor without demand or notice. *Ibid*.

EASEMENT.

Extent of an easement of private right of way and of the remedy in equity for an infringement of it by one of two co-owners who lowered the level of the way adjoining his land. *Draper v. Varnerin*, 67.

A blank space left in one corner of a large plan, upon which streets were designated and blocks of building lots were marked out, was held not necessarily to show an intention, in a deed conveying the house lots on the line of the extension of a street opposite the open space, which was made by a grantor who also owned the open space and referred to the plan, that this land should be left open or should be added to the width of the street. *Hobart v. Toule*, 293.

It accordingly was held that it properly could be found that by the reference to the plan in the deed no easement in the strip was created by grant or implication for the benefit of the lots of land on the opposite side of the extension of the street fifty feet wide. *Ibid.*

The owner of a wharf adjoining a private dock was held to have acquired by prescription the right to have the forward hatches of vessels unloading coal at his wharf overlap the adjoining wharf by more than two thirds of the vessels' length without interfering with any right of the public in navigable waters. *Wellington v. Cambridge*, 312.

Where a city by right of eminent domain takes an easement in land of a private person in another city for the construction and maintenance of a water conduit therein, the second city is not thereby precluded from laying out under the highway act a street over the land in which the easement has been acquired. *Perley v. Cambridge*, 507.

Where a city by right of eminent domain has taken an easement in private land for the purpose of the construction and maintenance of a water conduit, it has no right to prevent the owner of the land or his successors in title from making any use of the land for the laying of sewer, water or gas pipes, which does not interfere with the use by the city of the easement acquired by the taking. *Ibid.*

Private right of way, see *WAY, Private*.

Of public travel, see *WAY, Public*.

ELECTION.

Where a contract is made for the sale of certain shares of stock with the agreement that, if at any time the buyer wishes to return the shares, the seller will buy them back from him at the same price, a pledge of the shares by the buyer to the seller to secure a loan of money to the buyer is not an election by the buyer to keep the shares and not to insist on the seller's promise to buy them back. *Armstrong v. Orlor*, 112.

In an action for deceit in falsely representing that certain shares of stock in a mining corporation were treasury stock, it was held that the plaintiff by bringing his action for deceit elected to affirm his purchase of the shares and was bound by the rule of damages that he could recover only the difference between the value of the stock that he got and the value of the treasury stock that he would have got if the defendant's representation had been true, which was nothing at all. *Goodwin v. Dick*, 556.

Therefore, having failed to prove that he suffered damages by the defendant's false statement, he could not recover. *Ibid.*

ELEVATOR.

Action for personal injuries resulting from negligent operation of elevator, see appropriate subtitle under *NEGLIGENCE*.

EMINENT DOMAIN.

The exercise of the right of the public, gained by the taking of an easement of travel in a street, to construct subways and tunnels for public travel beneath the street a long time after the original laying out of the street, infringes no constitutional right of the owner of the fee to the land. *Peabody v. Boston*, 376.

Where a city by right of eminent domain has taken an easement in private land for the purpose of the construction and maintenance of a water conduit, it has no right to prevent the owner of the land or his successors in title from making any use of the land for the laying of sewer, water or gas pipes, which does not interfere with the use by the city of the easement acquired by the taking. *Perley v. Cambridge*, 507.

Where a city by right of eminent domain takes an easement in land of a private person in another city for the construction and maintenance of a water conduit therein, the second city is not thereby precluded from laying out under the highway act a street over the land in which the easement has been acquired. *Ibid.*

Indemnity for loss and expense due to an abandoned or void taking, see appropriate subtitle under DAMAGES.

Assessment of damages for property taken or impaired under statutory authority, see appropriate subtitle under DAMAGES.

EMPLOYER'S LIABILITY.

See that subtitle under NEGLIGENCE.

ENTRY, WRIT OF.

See WRIT OF ENTRY.

EQUITABLE RESTRICTION.

If the language of a deed of land specifically states "that the house first erected on" the land shall be subject to a certain restriction, and, "This agreement and restriction to apply solely to the house first erected on said premises and not to any house subsequently erected thereon," the restriction in no way applies to any building or structure erected upon the land after the first house is built thereon, although such first house remains standing, there being no implied restriction that only one house or building shall stand on the land at the same time. *Davidson v. Sohler*, 270.

EQUITY JURISDICTION.

No Enforcement of Unlawful Contract.

A court of equity, because of the monopoly sought to be established contrary to the provisions of St. 1908, c. 454, § 1, refused to enforce the restriction contained in certain contracts between a corporation issuing trading stamps and books and the merchants of a city and its vicinity by which the merchants agreed not to use trading stamps issued by any other cor-

poration or individual and not to sell the books or stamps to any one. *Merchants Legal Stamp Co. v. Murphy*, 281.

A corporation, which has issued trading stamps under contracts containing restrictions illegal and void under St. 1908, c. 454, § 1, cannot maintain a suit in equity to restrain a person, who with knowledge of the terms of such contracts bought the plaintiff's trading stamps from customers of the plaintiff, from buying and disposing of such stamps, where the defendant is not shown to have engaged in any fraud, deception or unfair competition. *Merchants Legal Stamp Co. v. Scott*, 389.

No Relief from Result of One's own Wrongdoing.

In a suit in equity by a trustee in bankruptcy to recover the amounts of accounts receivable assigned to the defendant in fraud of the law, the defendant cannot be allowed to contend that, if the assignment to him of the accounts receivable thus is to be set aside as in fraud of the law, he is entitled to recover the sums of money paid by him to the bankrupt when the assignment was made; because where one has committed a fraud upon the law he has no standing in court but is left by the law without a remedy in the position in which he put himself. *Rubenstein v. Lottow*, 156.

Laches.

In a suit in equity in which there was a decree for the plaintiff and in which the facts supported an inference that there had been no laches, it was said that, as the defence of laches was not set up in the answer, it could not have been relied on as a matter of right. *Albani v. Evening Traveler Co.* 20.

Adequate Remedy at Law.

It is no defence to a bill to enforce the specific performance of a contract to convey real estate that the plaintiff might recover damages at law for the defendant's breach of his contract. *Noyes v. Bragg*, 106.

After judgment had been entered for the plaintiff in an action upon a promissory note against the maker of the note, who was merely the nominal holder of the record title to certain land subject to a first and a second mortgage, the second mortgagee being the beneficial owner, it was held that the judgment debtor and the beneficial owner of the land, whose remedy at law was adequate, could not maintain a suit in equity against the judgment creditor to have set off against the judgment a sum of money received by the judgment creditor from the first mortgagee as surplus proceeds from a foreclosure of the first mortgage by sale. *Carter v. Exchange Trust Co.* 543.

For an Accounting.

A suit in equity may be maintained by a creditor of one having an interest as legatee under a will to enforce an assignment by the legatee to the creditor and to compel the executor of the will to account to him for the amount covered by the assignment although, after notice of and assent to the arrange-

ment, the executor has paid the legatee in full and his final account has been allowed. *Security Bank of New York v. Callahan*, 84.

Specific Performance of Contract.

Upon acceptance by the owner of a building of a surrender of a lease of the whole building from the general lessee while there is outstanding a sublease of a shop in the building containing a covenant for renewal made by the general lessee and good against him, the owner takes subject to the covenant in the sublease of the shop, and the sublessee in a suit in equity against such owner can enforce the specific performance of such covenant for renewal or can recover its equivalent in damages. *Albani v. Evening Traveler Co.* 20.

In a bill in equity to compel the specific performance of a contract to convey real estate, it is not necessary to set forth any special reason why the plaintiff is entitled to relief in equity. *Noyes v. Bragg*, 106.

It is no defence to such a bill that the plaintiff might recover damages at law for the defendant's breach of his contract. *Ibid.*

In a suit in equity to enforce the performance of a contract in writing to convey to the plaintiff certain real estate upon the payment by the plaintiff of the purchase money in full by monthly instalments as provided for in the contract, if the plaintiff shows that up to a certain time he had made all the payments required and that, when he tendered to the defendant the amount of an instalment then due, the defendant refused to receive it and conveyed the real estate to a third person, it is not necessary for the plaintiff in order to be entitled to a decree to show that he went through the nugatory act of making any further tender to the defendant. *Ibid.*

In such a suit where it appears that the plaintiff is entitled to a deed conveying to him a good title to the real estate in question subject to the rights of a telephone company that were acquired after the making of the contract and for which the plaintiff had accepted payment, a decree that orders the defendant to convey the property to the plaintiff by a warranty deed is in that respect erroneous. *Ibid.*

In a suit in equity to enforce the specific performance of a contract in writing to convey certain real estate to the plaintiff for \$1,100 "with interest from date," the plaintiff to pay \$25 in each month until the price was paid in full and to pay insurance and taxes, a decree ordering the defendant to deliver a deed of the property to the plaintiff on payment by the plaintiff of the full amount of the purchase money, with interest from the date of the agreement until the date of the filing of the bill, was held to be erroneous. *Ibid.*

Where a contract was made for the sale of certain shares of stock with an agreement that, if at any time the buyer wished to return the shares, the seller would buy them back from him at the same price, in a suit in equity by the buyer to compel the seller to take back the shares at the original price, it was held, that on the facts found by the trial judge the demand to take back the shares, which was made about nine months after the making of the contract, was made within a reasonable time. *Armstrong v. Orler*, 112.

If in such a suit it appears that the buyer pledged the shares to the seller to secure a loan, this is not an election by the buyer to keep the shares and is not a bar to the suit. *Ibid.*

To enforce Assignment of Interest in Estate of Decedent.

A suit in equity may be maintained by a creditor of one having an interest as legatee under a will to enforce an assignment by the legatee to the creditor and to compel the executor of the will to account to him for the amount covered by the assignment although, after notice of and assent to the assignment, the executor has paid the legatee in full and his final account has been allowed. *Security Bank of New York v. Callahan*, 84.

To relieve from Results of Fraud.

In a suit in equity by a trustee in bankruptcy to recover the amount of an alleged unlawful preference by the assignment by the bankrupt to the defendant of certain accounts receivable, where it appears that the assignment was in part for the purpose of enabling the bankrupt to continue in business for a sufficient length of time to prevent the trustee in bankruptcy, when appointed, from avoiding the assignment as a preference, this shows a fraud upon the law which entitles the trustee in bankruptcy to recover the amount of the assignment, in spite of the fact that the bankrupt may have received from the defendant the full value of the accounts assigned so that his estate was not diminished. *Rubenstein v. Lottow*, 156.

In such a suit the defendant cannot be allowed to contend that, if the assignment to him of the accounts receivable thus is to be set aside as in fraud of the law, he is entitled to recover the sums of money paid by him to the bankrupt when the assignment was made; because where one has committed a fraud upon the law he has no standing in court but is left by the law without a remedy in the position in which he put himself. *Ibid.*

Suits in equity by makers of various notes to be relieved from the results of fraudulent acts of the general agent of an insurance company, to whom the notes were delivered, in altering the notes and in exceeding his authority as to them and as to incomplete assignments of insurance policies delivered to him by the makers in pledge or to be used for the purposes of pledge. *Tower v. Stanley*, 429; *Munroe v. Stanley*, 438; *Stone v. Sargent*, 445.

The allegations of a bill in equity by minority stockholders in a Massachusetts corporation against another stockholder, who held the majority of its stock and was alleged to be in control of it, averring fraudulent manipulation by the defendant of a Maine corporation, which the Massachusetts corporation succeeded, in pursuance of a certain fraudulent purpose, were held to set forth a case where the Massachusetts corporation, for whose benefit the suit was brought, was entitled to relief of some sort, the form of which it was not necessary then to determine. *Keith v. Radway*, 532.

Unlawful Preference by Bankrupt.

A trustee in bankruptcy of the estate of a person, who was a member of a partnership until about two months before he was adjudicated a bankrupt, cannot maintain a suit in equity to recover the amount of an alleged unlawful preference where the transfer sought to be avoided was made by the partnership and not by the plaintiff's bankrupt individually, be-

Equity Jurisdiction (continued).

cause the assets thus transferred could be recovered only for the creditors of the partnership. *Rubenstein v. Lottow*, 156.

To recover Property transferred by Bankrupt with Intent to hinder and delay Creditors.

Right of trustee in bankruptcy to recover such property. *Halbrook v. International Trust Co.* 150.

In a suit in equity against a woman by the administrator of her husband's estate, which was insolvent, to set aside certain conveyances made by the intestate to the defendant through an intermediary which were alleged to have been fraudulent against his creditors at common law and under St. 13 Eliz. c. 5, it was held, that a decree dismissing the bill should be sustained, because findings were warranted that the conveyances in question were made *bona fide* in execution of resulting trusts, and were not made with intent to hinder, delay or defraud creditors. *Hutchins v. Mead*, 348.

To enforce Trust.

Where a suit in equity is brought in the Superior Court to establish the beneficial ownership of a plaintiff in certain savings bank deposits which stood in the name of one deceased as trustee, and the Probate Court has authorized a special administrator to appear and defend the suit, the Superior Court, on finding that the deposits are the property of the plaintiff, has authority to enter a decree ordering the special administrator to deliver the savings bank books to the plaintiff and ordering the banks thereupon to pay to the plaintiff the amounts of the deposits. *Meagher v. Kimball*, 32.

Bill for Instructions.

It was held that, under the circumstances, a decision of this court rendered about twenty-eight years ago in a suit in equity by the trustee under a certain will for instructions should not be reversed nor modified in another suit in equity by a succeeding trustee under the same will for instructions as to the meaning of the same clause. *Sherburne v. Littel*, 385.

Whether all the parties in the present suit were represented in the former suit in such a way that the decision and decree in the former suit made *res judicata* the issues raised in the present suit, was not determined, this court preferring to rest its decision in the present suit upon the soundness in principle of the previous decision. *Ibid.*

To determine Validity of Election of Trustees of Church.

Where property is held by trustees "for the use of the members of the Methodist Episcopal Church in the United States of America according to the rules and discipline which from time to time may be agreed upon and adopted," and where the discipline of the church provides that questions relating to the election of such trustees shall be determined within the church by appeal to the appropriate conference, resort cannot be had to the courts to determine by a suit in equity or otherwise the validity of the election of such trustees until the usual methods of relief within the organization have been tried and found wanting. *Crawford v. Nies*, 61.

Unjust Enrichment.

A purchaser for value without notice of fraud of a promissory note delivered by the maker to the agent of an insurance company in payment of premiums on a policy of the maker and fraudulently altered by the agent by erasing the company's name as payee and substituting the purchaser's, was not allowed to recover from the maker in a suit in equity by showing that the agent paid the maker's premiums to the company in balancing his accounts with it. *Andrews v. Sibley*, 10.

To enjoin Infringement of Easement.

Extent of an easement of private right of way and of the remedy in equity for an infringement of it by one of two co-owners who lowered the level of the way adjoining his land. *Draper v. Varnerin*, 67.

To enjoin Enforcement of Judgment.

Where the counsel for a bankrupt, after having appeared to defend an action of contract against the bankrupt, withdrew from the case without the defendant's knowledge and did not set up the defence of the defendant's discharge in bankruptcy, by reason of which the defendant without his knowledge was defaulted and afterwards was arrested on execution, the question, whether, if the bankrupt could show that the judgment against him had been obtained fraudulently, a court of equity would enjoin the judgment creditor from attempting to enforce it, was referred to as not passed upon. *Herschman v. Justices of the Municipal Court of the City of Boston*, 137.

To enforce Stockholder's Right to inspect Books of Corporation.

Extent of such remedy given to stockholder. *Powelson v. Tennessee Eastern Electric Co.* 380.

Whether one of three persons who hold shares of the capital stock of a Massachusetts corporation solely as trustees under a voting trust, by reason of such ownership and of the fact that he is the owner of a large number of the voting trust receipts, may maintain a bill in equity under St. 1903, c. 437, § 30, to compel the corporation and its officers to allow him to examine its stock transfer books, was not decided in a case, in which a stockholder in his own right had been allowed to intervene as a party plaintiff. *Ibid.*

Nor was it decided whether a stockholder of a Massachusetts corporation is entitled, under St. 1903, c. 437, § 30, to examine the stock and transfer books of the corporation irrespective of his motive or purpose in so doing, because, on an inspection of the record, it seemed reasonable to infer that the single justice who heard the case was satisfied that the plaintiff was acting in good faith. *Ibid.*

To enjoin Transaction of Unauthorized Business by Corporation.

St. 1906, c. 372, does not give the Supreme Judicial Court power to enjoin a corporation to which a permit has been granted in due form under St.

Equity Jurisdiction (continued).

1906, c. 421, as amended by St. 1911, c. 423, for transportation of spirituous and intoxicating liquors into or in a city, from conducting business in accordance with the permit, although the holder of the permit is not "regularly and lawfully conducting a general express business" according to the requirement of the amended § 2 of the statute. *Attorney General v. Lyons*, 536.

Equitable Set-off.

After judgment has been entered for the plaintiff in an action upon a promissory note against the maker of the note, who is the nominal holder of the record title to certain land subject to a first and a second mortgage, the second mortgagee being the beneficial owner of the land who had delivered the second mortgage to the plaintiff as collateral security for the note of the defendant, the judgment debtor and the beneficial owner of the land, whose remedy at law is adequate, cannot maintain a suit in equity against the judgment creditor to have set-off against the judgment a sum of money received by the judgment creditor from the first mortgagee as surplus proceeds from a foreclosure of the first mortgage by sale, even although before the entry of the judgment the amount of such surplus could not be ascertained and therefore could not be pleaded in the action upon the note. *Carter v. Exchange Trust Co.* 543.

EQUITY PLEADING AND PRACTICE.**Parties.**

It is irregular for a person whose rights are affected by a suit in equity to which he is not a party to file a "stipulation" agreeing to be bound by the decree to be entered in it. To be affected by the proceeding the person concerned should be made a party to the suit. *Hanscom v. Malden & Melrose Gas Light Co.* 1.

A motion to dismiss a bill in equity is not the proper way to take the objection that necessary parties have not been joined as defendants. *Noyes v. Bragg*, 106.

Bill.

In a suit in equity to determine what persons as trustees are entitled to the possession of certain funds to be held upon a charitable trust, where all the persons claiming the right to act as such trustees have been joined as parties and where the defendants have proceeded without objection to a general hearing upon the merits before a master, whose report covers the whole case as set forth in the bill, it is too late for the defendants to raise the objection that the bill is multifarious. *Crawford v. Nies*, 61.

In a bill in equity to compel the specific performance of a contract to convey real estate, it is not necessary to set forth any special reason why the plaintiff is entitled to relief in equity. *Noyes v. Bragg*, 106.

Cross Bill.

No affirmative relief can be granted to a defendant in a suit in equity unless it is asked for in a cross bill. *Hanscom v. Malden & Melrose Gas Light Co.* 1.

In a suit in equity by the owner of land with a two story building thereon and with a party wall standing upon it and adjoining land extending several stories above that building, against the lessee of the two story building and the owner of the adjoining building to enforce an alleged right to have openings, which had been made in the wall for windows, closed, it is a proper subject for a cross bill by the owner of the adjoining building against the plaintiff and one to whom he had conveyed his right in the party wall to seek to compel the removal of shutters placed by them over the openings in the wall. *Torrey v. Parker*, 520.

Supplemental Bill.

Circumstances under which, after a rescript in favor of a plaintiff in a suit in equity, it is proper for him by a motion to amend his bill to obtain relief beyond its scope. *Hanscom v. Malden & Melrose Gas Light Co.* 1.

Right of the defendant in such case to plead, demur or answer. *Ibid.*

Scope of the final decree in such case. *Ibid.*

Where in a suit in equity, after a rescript for the plaintiff, the plaintiff filed a motion for a final decree, setting forth events which had occurred since the filing of the bill and asking for new relief and the defendant then filed what was termed "An answer to motion for final decree and execution," which was elaborate in form, the plaintiff's motion was treated by this court as a motion to amend the bill and the answer was treated as an answer to the bill as amended, and the case was considered on that footing. *Ibid.*

Demurrer.

Right of a defendant to demur to a supplemental bill filed after rescript. *Hanscom v. Malden & Melrose Gas Light Co.* 1.

By proceeding with a hearing before a master of a suit in equity and a cross suit, the defendant in the cross suit waives a demurrer which was included in his answer to the cross bill. *Torrey v. Parker*, 520.

Answer.

Right of a defendant to answer to a supplemental bill filed after rescript. *Hanscom v. Malden & Melrose Gas Light Co.* 1.

In a suit in equity in which there was a decree for the plaintiff and in which the facts supported an inference that there had been no laches, it was said that, as the defence of laches was not set up in the answer, it could not have been relied on as a matter of right. *Albani v. Evening Traveler Co.* 20.

Motion to dismiss.

A motion to dismiss a bill in equity is not the proper way to take the objection that necessary parties have not been joined as defendants. *Noyes v. Bragg*, 106.

Rules of Court.

Equity Rule 37. *Rubenstein v. Lottow*, 156.

Suits heard together.

Where two suits in equity brought by the same plaintiff against different defendants are tried together for the convenience of the court and the parties, but no order is made for the consolidation of the suits, a separate decree should be entered in each suit. *Rubenstein v. Lottow*, 156.

Master.

Where in a suit in equity it was plain on the evidence that a certain lease had been surrendered by the lessee and that its surrender was accepted by the lessor, it was held that a contention, that this constituted in effect an entry for breach of condition, could not prevail against the findings of a master to the contrary. *Albani v. Evening Traveler Co.* 20.

Stipulation.

It is irregular for a person whose rights are affected by a suit in equity to which he is not a party to file a "stipulation" agreeing to be bound by the decree to be entered in it. To be affected by the proceeding the person concerned should be made a party to the suit. *Hanscom v. Malden & Melrose Gas Light Co.* 1.

Findings by Trial Judge.

From a bill of exceptions filed by the plaintiff in a suit in equity it appeared that the rulings of the trial judge were wrong but that, upon a proper application of the law to the facts found by the judge, it was clear that the whole case was before this court and that a decree should be made for the plaintiff, and therefore this court under St. 1913, c. 716, § 3, ordered that such a decree be entered. *O'Brien v. Massachusetts Catholic Order of Foresters*, 79.

The rule, that in a suit in equity a decision of the trial judge upon the facts will not be overturned unless plainly wrong, is not applicable where the findings of fact made by the judge show that he did not believe the witnesses on either side, so that his findings could not have been affected by the confidence that he reposed in the testimony of any of the witnesses that he saw and heard testify. *Rubenstein v. Lottow*, 156.

Certain conclusions of fact made by a trial judge in a case of this character, which on the facts reported by him were found to be wrong. *Ibid.*

Exceptions.

From a bill of exceptions filed by the plaintiff in a suit in equity it appeared that the rulings of the trial judge were wrong but that, upon a proper application of the law to the facts found by the judge, it was clear that the whole case was before this court and that a decree should be made for the plaintiff, and therefore this court under St. 1913, c. 716, § 3, ordered that such a decree be entered. *O'Brien v. Massachusetts Catholic Order of Foresters*, 79.

Costs.

Where costs are imposed in a suit in equity, the amount of the costs that are to be paid should be stated in the decree. *Rubenstein v. Lottow*, 156.

Decree.

Scope of relief to be given by a final decree upon a bill in equity amended after rescript. *Hanacom v. Malden & Melrose Gas Light Co.* 1.

From a bill of exceptions filed by the plaintiff in a suit in equity it appeared that the rulings of the trial judge were wrong but that, upon a proper application of the law to the facts found by the judge, it was clear that the whole case was before this court and that a decree should be made for the plaintiff, and therefore this court under St. 1913, c. 716, § 3, ordered that such a decree be entered. *O'Brien v. Massachusetts Catholic Order of Foresters*, 79.

Error in a decree prejudicial to the plaintiff was not ordered corrected where the plaintiff had not appealed. *Noyes v. Bragg*, 106.

Decree which was held to be erroneous because it directed a defendant to convey certain land to the plaintiff by a warranty deed when it appeared that the plaintiff, who was in possession, had given a telephone company an easement in the land. *Ibid.*

In the same suit it was held that the decree was erroneous because it was not fair to the defendant as to the amount of interest he should receive from the plaintiff. *Ibid.*

Where in a suit in equity in the Superior Court a decree is to be drawn after a hearing of the parties and their witnesses, the decree should follow the form indicated by Equity Rule 37, and it should not be recited that the case was heard upon the "bill, . . . the answer thereto and the other pleadings," which would mean that there was no hearing on the facts. *Rubenstein v. Lottow*, 156.

Where two suits in equity brought by the same plaintiff against different defendants are tried together for the convenience of the court and the parties, but no order is made for the consolidation of the suits, a separate decree should be entered in each suit. *Ibid.*

Where one of several claims of the plaintiff in a suit in equity has been disallowed, although the others have been established, it is proper in the decree either to order that the bill be dismissed so far as that claim is concerned or not to refer to it at all, instead of making an order that the plaintiff is not entitled to recover the amount of money covered by that claim. *Ibid.*

Where costs are imposed in a suit in equity the amount of the costs that are to be paid should be stated in the decree. *Ibid.*

Appeal.

In a suit in equity to enforce the specific performance of a contract to convey certain real estate to the plaintiff, where a decree ordering a conveyance of the property to the plaintiff is defective in failing to require the defendant to insert in the deed a full description of the property as described in a previous agreement between the parties, and the defendant appeals from the decree but the plaintiff does not appeal, the decree will not be changed in this respect for the benefit of the plaintiff who has not complained of it. *Noyes v. Bragg*, 106.

On an appeal from a final decree in a suit in equity entered in pursuance of findings of fact made by the judge who heard the case, if the evidence on

Equity Pleading and Practice (continued).

which these findings were based is not a part of the record, the only question presented is whether on the findings of the judge the decree entered was a proper one. *Armstrong v. Orlor*, 112.

The rule, that in a suit in equity a decision of the trial judge upon the facts will not be overturned unless plainly wrong, is not applicable where the findings of fact made by the judge show that he did not believe the witnesses on either side, so that his findings could not have been affected by the confidence that he reposed in the testimony of any of the witnesses that he saw and heard testify. *Rubenstein v. Lottow*, 156.

Certain conclusions of fact made by a trial judge in a case of this character, which on the facts reported by him were found to be wrong. *Ibid.*

In a suit in equity, in considering an appeal from a decree made by a single justice who heard the case without oral evidence upon a stenographic report of evidence in another proceeding and certain exhibits, it was said that there was no presumption in favor of the finding of the single justice and that, so far as the evidence was concerned, this court stood where he had stood when the decree was made. *Hutchins v. Mead*, 348.

ESTOPPEL.

Effects under various circumstances of the delivery in pledge of assignments of life insurance policies, leaving blank the places for the names of the assignees and of the persons to whom power of attorney was given. *Tower v. Stanley*, 429; *Munroe v. Stanley*, 438; *Stone v. Sargent*, 445.

Abolition by R. L. c. 73, § 31, of the former rule of common law as to the estoppel which arose when a note, signed in blank, came into the hands of a *bona fide* purchaser. *Ibid.*

Conduct of the lessee of a two story bank building by which, it was held, he was not estopped to deny the lessor's right of control of a portion of a party wall between the building and one adjoining which extended several stories above the bank building. *Torrey v. Parker*, 520.

In an action on certain promissory notes against an indorser, whose defence was that he indorsed the notes without consideration at the request and for the accommodation of the plaintiff, the record of a judgment against the defendant in a certain action which he had brought against the plaintiff on an independent demand, and before bringing which he had claimed the right to set off that demand against his liability on the notes, was held not to be admissible to impeach his credibility, because that judgment settled only the controversy then on trial and did not affect the present issue either by estoppel or as an admission. *Connors Brothers Co. v. Sullivan*, 600.

EVIDENCE.*Matters of Common Knowledge.*

It is to be assumed that jurors as a matter of common knowledge are familiar with the fact that it is customary to use oil stains upon floors and know that such oil stains after being applied to floors ordinarily do not explode and ignite when the person engaged in using the stain happens to light a match. *Thornhill v. Carpenter-Morton Co.* 593.

Presumptions and Burden of Proof.

For applications of the doctrine of *res ipsa loquitur*, see that subtitle under NEGLIGENCE.

If the lawful possessor of a dog with the consent of its owner delivers it into the possession of its former owner and no more appears, it cannot be inferred that the purpose of this delivery was to revest the title in the former owner by way of gift, sale or otherwise, and such delivery creates at the highest a gratuitous bailment revocable at the pleasure of the bailor without demand or notice. *Herries v. Bell*, 243.

In a suit in equity, in considering an appeal from a decree made by a single justice who heard the case without oral evidence upon a stenographic report of evidence in another proceeding and certain exhibits, it was said that there was no presumption in favor of the finding of the single justice and that, so far as the evidence was concerned, this court stood where he had stood when the decree was made. *Hutchins v. Mead*, 348.

When the question is presented to this court, whether a rule prescribing the qualifications of applicants for admission to the bar, which was made by the board of bar examiners and was approved by this court under R. L. c. 165, § 40, as amended by St. 1904, c. 355, § 1, is unreasonable and therefore ought not to be enforced, the previous approval of the rule by this court without the benefit of argument raises no presumption in favor of the rule and the question must be considered as if it were presented for the first time. *Bergeron, petitioner*, 472.

Even though, in the records of town meetings in 1852, with reference to action upon a petition for the laying out of a certain town way, there was no record that the laying out with boundaries and measurements had been filed with the town clerk seven days before the meeting as required by Rev. Sta. c. 24, § 69, it was held that it might be presumed or inferred after sixty years that the statutory requirement was complied with. *Reed v. Mayo*, 565.

In an action by a woman against a street railway corporation for personal injuries sustained when the plaintiff was a passenger in a car of the defendant in a subway, approaching a station, certain testimony of the plaintiff and other evidence as to the movements of the car were held not to be sufficient evidence of the negligence of the motorman to require the submission of the case to the jury. *Anderson v. Boston Elevated Railway*, 28.

In an action by a domestic servant for alleged slander in answering inquiries in regard to the plaintiff's character and capabilities, where the plaintiff contends that the defendant made the statements complained of with malice so that the defence of privilege is not available, it is wrong for the presiding judge to instruct the jury that "the burden is upon the defendant to show that [the words spoken by the defendant] were privileged words, for which she is not answerable." *Doane v. Grew*, 171.

On the contrary, where the occasion is shown to have been a privileged one, the burden is on the plaintiff to prove malice. *Ibid.*

In proceedings before the Industrial Accident Board, in which the dependent widow of a deceased employee seeks to obtain compensation for her husband's death under the provisions of the workmen's compensation act, the burden of proof is upon the dependent to satisfy the board that the employee's service was such as to entitle her to compensation for his death. *King's Case*, 290.

Evidence (continued).

Where under the workmen's compensation act a claim for compensation is made by the dependent widow of an employee whose death is alleged to have resulted from an injury arising out of and in the course of his employment, the burden of proving the essential facts necessary to warrant an award of compensation rests upon the dependent in the same way that the burden of proof rests upon the plaintiff in any proceeding at law. *Sponatski's Case*, 526.

In an action against the payee of a note by one for whom he indorsed it, where the defendant contends that he received no consideration for the indorsement but indorsed solely for the accommodation of the plaintiff, and where the facts are in dispute, the burden is on the plaintiff to prove that the defendant received a consideration for his indorsement of the notes. *Connors Brothers Co. v. Sullivan*, 600.

Inferences.

Even though, in the records of town meetings in 1852, with reference to action upon a petition for the laying out of a certain town way, there was no record that the laying out with boundaries and measurements had been filed with the town clerk seven days before the meeting as required by Rev. Sts. c. 24, § 69, it was held that it might be presumed or inferred after sixty years that the statutory requirement was complied with. *Reed v. Mayo*, 565.

Matter of Conjecture.

In an action against a railroad corporation for causing the death of a trainman in a freight yard of the defendant who was found dead beneath a freight car which by the impact of some shunted cars had been pushed about five feet a short time before, it was held that a verdict must be ordered for the defendant, because it was a matter of conjecture whether the intestate at the time he was killed was engaged in the performance of his duties and was in the exercise of due care. *Robichaud v. New York, New Haven, & Hartford Railroad*, 250.

Where, in an action against the proprietor of a mill for causing the death of a boy employed as a back boy, an exception to the refusal of the presiding judge to order a verdict for the defendant was sustained on the ground that the conduct of the boy at the time of the accident that caused his death was a matter of conjecture so that there was no evidence warranting a finding that he was in the exercise of due care, certain additional evidence was held not to make the question of his conduct at that time any less a matter of conjecture. *Taylor v. Pierce Brothers, Ltd.* 254.

Admissions.

In an action by a woman for the loss of a fur coat which she had delivered to the defendant as a bailee for hire to keep for her in cold storage, certain excuses and conduct of the defendant's employees were held to constitute evidence of the defendant's negligence, on which the plaintiff, who had not agreed to any valuation of her fur coat, could recover the full value of the coat from the defendant if she obtained a verdict. *Cohen v. Henry Siegel Co.* 215.

At the trial of a complaint under R. L. c. 100, § 1, for keeping intoxicating liquors in a certain town with intent to sell them unlawfully, the Commonwealth, to prove the defendant's unlawful intent, sought to prove also an illegal transportation of intoxicating liquors by him, and certain pages of a book which he kept and which was such a book as was required by the statutes in case the town in question was a no-license town, headed "Liquor Shipments delivered at no-license cities and towns in Massachusetts," were held to be admissible as an admission by the defendant that the town in question was a no-license town and that he had delivered liquor there. *Commonwealth v. Cronan*, 467.

Recitals in deeds of respondents in a petition for the registration of the title to land, which were held to be evidence against the respondents' contentions as to one of the issues in the case. *Reed v. Mayo*, 565.

In an action on certain promissory notes against an indorser, whose defence was that he indorsed the notes without consideration at the request and for the accommodation of the plaintiff, the record of a judgment against the defendant in a certain action which he had brought against the plaintiff on an independent demand, and before bringing which he had claimed the right to set off that demand against his liability on the notes, was held not to be admissible to impeach his credibility, because that judgment settled only the controversy then on trial, and did not affect the present issue either by estoppel or as an admission. *Connors Brothers Co. v. Sullivan*, 600.

Extrinsic affecting Writing.

The position on the paper of words written in an order for goods may create such an ambiguity as to render oral evidence admissible to explain the meaning of the instrument. *Waldstein v. Dooskin*, 232.

Application of the foregoing principle in determining the meaning of the words "if desired" in a purchase order, where it was held that it could not be ruled as a matter of law that those words related only to the time of shipment, and that there was enough of doubt and uncertainty as to their meaning to warrant the admission of evidence to explain them and to require the submission of the question of their meaning to the jury. *Ibid.*

In an action by an indorsee of a promissory note against the payee, the defendant was allowed to show that he indorsed the note solely for the accommodation of the plaintiff. *Connors Brothers Co. v. Sullivan*, 600.

Competency.

At the trial of a petition under R. L. c. 48, §§ 69, 94, for indemnity for loss and expense incurred by proceedings resulting in a taking by a city of land for the widening of a street which became void, questions seeking from the petitioner and from a qualified expert testifying in his behalf their opinions or estimate as to the extent of the petitioner's loss by the taking are not competent. *Munroe v. Woburn*, 116.

At the trial of a complaint under R. L. c. 100, § 1, for keeping intoxicating liquors with intent to sell them unlawfully, evidence that certain packages in the possession of the defendant were marked "Ale and Porter" is competent to show that the packages contained those liquors. *Commonwealth v. Cronan*, 467.

Evidence (continued).

At the trial of a complaint under R. L. c. 100, § 1, against a person carrying on a general express business for keeping intoxicating liquors, shipped from Providence, Rhode Island, in a certain town with intent to sell them unlawfully, a bill of lading issued by the shipper to a Providence express company, containing the names and addresses of four persons other than the defendant, opposite each of which were written in figures certain quantities of liquor, was held under the circumstances properly to have been admitted in evidence solely to show that the intoxicating liquors were at the time of the alleged offence in the town in which they were alleged to have been kept with unlawful intent. *Commonwealth v. Cronan*, 467.

In the same case a freight receipt for the intoxicating liquors in question signed "Interstate Express Co. by" the initials of a person who the evidence tended to show was an employee of the defendant and took the packages of liquors from the Providence express company was held, in connection with other evidence, to be admissible to show that the liquors came into the possession and control of the defendant. *Ibid*.

In an action on certain promissory notes against an indorser, whose defence was that he indorsed the notes without consideration at the request and for the accommodation of the plaintiff, the record of a judgment against the defendant in a certain action which he had brought against the plaintiff on an independent demand, and before bringing which had claimed the right to set off that demand against his liability on the notes, was held not to be admissible to impeach his credibility, because that judgment settled only the controversy then on trial, and did not affect the present issue either by estoppel or as an admission. *Connors Brothers Co. v. Sullivan*, 600.

Relevancy and Materiality.

In a suit in equity, in determining the equivalent in money of the plaintiff's right to a renewal of a lease of a barber's shop in which he carried on a thriving and increasing business, where the plaintiff by oral testimony has furnished a basis for determining the profits of his business, although no books of account were kept, it is proper for the presiding judge to exclude evidence offered by the defendant as to the custom of keeping books by other persons in the same business. *Albani v. Evening Traveler Co.* 20.

In the same case it also was held to have been proper to exclude evidence offered by the defendant as to accommodations in other parts of the building in rooms substantially unlike the plaintiff's shop in location and in opportunity for attracting customers after a necessary interruption of business. *Ibid*.

In an action for additional rent due under an oral agreement modifying an agreement in writing, the agreement in writing is admissible in evidence as one of the steps by which the defendant's liability to the plaintiff is established. *Freedman v. Gordon*, 324.

Remoteness.

Evidence, in an action by a nursery maid against a former employer for alleged slander in answering inquiries in regard to the plaintiff's character and capabilities while in the defendant's employ, that the plaintiff had ap-

plied to two women for a position as nursery maid and had referred them to the defendant and that in each case she afterwards had received word that her services were not required, which, it was held, ought not to be admitted at a new trial which was ordered. *Doane v. Grew*, 171.

Opinion: Experts.

In an action for personal injuries caused by the sudden ignition of a walnut oil stain when it was being applied to a floor, an expert properly qualified may be allowed to give his opinion as to the distance from the floor at which ignition of the inflammable substance would be produced by a lighted match. *Thornhill v. Carpenter-Morton Co.* 593.

Ancient Records.

Even though, in the records of town meetings in 1852, with reference to action upon a petition for the laying out of a certain town way, there was no record that the laying out with boundaries and measurements had been filed with the town clerk seven days before the meeting as required by Rev. Sts. c. 24, § 69, it was held that it might be presumed or inferred after sixty years that the statutory requirement was complied with. *Reed v. Mayo*, 565.

By Deposition.

Deposition of a witness in an action at law, taken upon oral interrogatories on the ground that the witness was about to go out of the Commonwealth not to return in time for the trial, which under the circumstances was held not to be inadmissible in evidence merely by reason of the fact that the notice that it was to be taken, given by the justice of the peace before whom it was to be taken to the party objecting to its admission, misspelled that party's name. *McLellan v. Fuller*, 494.

Auditor's Report.

Where an auditor's report is in evidence before a jury, the finding of a fact by the auditor is evidence of that fact for the jury, whether the auditor was right or wrong in making the finding. *Holbrook v. International Trust Co.* 150.

Experiment.

Under the circumstances, at the trial of an action for personal injuries caused by the sudden ignition of a walnut oil stain when it was being applied to a floor, it was held to have been within the discretion of the presiding judge to refuse to permit an experiment to be tried by lighting and extinguishing a can of the inflammable oil stain in the presence of the jury. *Thornhill v. Carpenter-Morton Co.* 593.

X-ray Photographic Plates.

X-ray negatives, if properly taken by a person duly qualified, may be admitted in evidence in an action of tort for personal injuries to show the condition

Evidence (continued).

of the bones of the plaintiff's nose which are alleged to have been injured through the carelessness of an agent of the defendant. *Doyle v. Singer Sewing Machine Co.* 327.

Photograph.

At the trial of a petition for the assessment of damages sustained from the laying out as a public highway of a private street adjoining the petitioner's land and raising the grade of such street, the presiding judge in his discretion properly may permit the introduction in evidence of a photograph of the land taken about fifteen years before the trial by the petitioner, who had lived on the land off and on for sixteen years and who testified that "no one ever touched the street until the city accepted it." *Wooley v. Fall River*, 584.

In Rebuttal.

Where, at the trial of an action of tort for damages resulting from a break in a dam, it is a part of the plaintiff's case to prove that the title to the dam is in the defendant, it is within the discretion of the trial judge to refuse to permit the plaintiff to introduce in rebuttal evidence which tends merely to support that part of his case in chief and has no tendency to explain or control any evidence offered by the defendant. *Briggs v. Adams*, 262.

Of Agency.

The authority of an agent cannot be proved by his own statements. *Newburyport Institution for Savings v. Brookline*, 300.

The admission in evidence, at the trial of a petition by a banking corporation against a town for the assessment of damages due to the taking of one half of a path for a public footpath, of a certain letter, written to the chairman of the selectmen of the town before the taking with regard to the town assuming care of the path, was held to have been erroneous, because there was no evidence of authority of its writer to bind the bank. *Ibid.*

Of Conversation.

In a criminal case a general exception to the admission in evidence of a certain conversation cannot be sustained if a part of the conversation was admissible. If the defendant wishes to except to the admission of a part of the conversation he must state this to the presiding judge, or, after the conversation has been admitted in evidence, he can move to have the part of it which is inadmissible stricken out. An exception to a denial by the judge of a motion to strike out all the testimony relating to the conversation cannot be sustained. *Commonwealth v. Anderson*, 142.

Of Contents of Package.

At the trial of a complaint under R. L. c. 100, § 1, for keeping intoxicating liquors with intent to sell them unlawfully, evidence that certain packages in the possession of the defendant were marked "Ale and Porter" is competent to show that the packages contained those liquors. *Commonwealth v. Cronan*, 467.

Of Degree of Culpability in Action for causing Death.

At the trial of an action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, by the administrator of one whose death was alleged to have been caused by negligence of an employee of the defendant in sweeping gasoline into a pit in a cellar, evidence is admissible, as bearing on the degree of culpability of the defendant's employee, to show that the employee stubbornly persisted in so disposing of the gasoline although persons standing by at the time told him that he should not do so and suggested to him a proper way in which to dispose of it. *Leahy v. Standard Oil Co. of New York*, 90.

Of Damage to Property.

See DAMAGES, For Property taken or impaired under Statutory Authority.

Of Extent of Easement.

At the trial of a petition against the town of Brookline for the assessment of damages due to the taking of one half of a path, which was subject to an easement of use "for all the purposes for which such passageways now are or at any time hereafter may be commonly used in said town of Brookline," evidence was held to be admissible, for the purpose of proving that no greater servitude existed after than before the taking, of all the physical uses made of similar paths in Brookline, irrespective of the provisions of the deeds, instruments or public acts which created them. *Newburyport Institution for Savings v. Brookline*, 300.

Of Intent.

Upon a complaint under R. L. c. 100, § 1, for keeping intoxicating liquors in a certain town with intent to sell them unlawfully, evidence, which warranted a finding that the defendant in violation of R. L. c. 100, § 49, as amended by St. 1912, c. 201, made a delivery of the intoxicating liquors in the town in question which under the terms of that statute must be deemed to have been a sale, is evidence that he kept the liquors illegally. *Commonwealth v. Cronan*, 467.

Of Knowledge by Corporation.

Knowledge of certain facts by one employed by a corporation publishing a newspaper and called the assistant treasurer of the company, although no such office was recognized by the by-laws, which was held sufficient to support a finding that the corporation had such knowledge as a corporation can have of the existence of a lease and the covenant to renew made by him in its behalf. *Albiani v. Evening Traveler Co.* 20.

Compare, also, *Broadway National Bank of Chelsea v. Heffernan*, 247.

Of Malice.

In an action for slander evidence of a repetition in substance of the alleged slander is admissible to show malice. *Doane v. Grew*, 171.

Evidence, in an action by a nursery maid against a former employer for alleged slander in answering inquiries in regard to the plaintiff's character

Evidence (continued).

and capabilities while in the defendant's employ, that the plaintiff had applied to two women for a position as nursery maid and had referred them to the defendant and that in each case she afterwards had received word that her services were not required, which, it was held, ought not to be admitted at a new trial which was ordered. *Doane v. Grew*, 171.

Evidence in such an action which, it was held, tended to show that the defendant was angry with the plaintiff and was sufficient evidence of malice to entitle the plaintiff to go to the jury, where she already had introduced evidence tending to show that the defendant in answering inquiries had made statements in regard to the plaintiff that were not in fact true. *Ibid.*

In such an action it is wrong for the presiding judge to instruct the jury that "the burden is upon the defendant to show that [the words spoken by the defendant] were privileged words, for which she is not answerable." *Ibid.* On the contrary, where the occasion is shown to have been a privileged one, the burden is on the plaintiff to prove malice. *Ibid.*

Of Profits.

In a suit in equity, in determining the equivalent in money of the plaintiff's right to a renewal of a lease of a barber's shop in which he carried on a thriving and increasing business, the plaintiff's testimony may furnish some basis for determining the profits of his business, although no books of account were kept. *Albani v. Evening Traveler Co.* 20.

Of Disobedience of Rules.

In an action against a railroad corporation for causing the death of a flagman in a freight yard of the defendant, it was held that the defendant had no right to rely, in support of the ordering of a verdict in its favor, on any evidence or inference as to the intestate's knowledge of rules of the defendant nor as to his disobedience of them. *Robichaud v. New York, New Haven, & Hartford Railroad*, 250.

Of Title.

It was held that, at the trial of an action by the owner of land near the sea for damages alleged to have been caused by water flooding that land by reason of a break in a dam which the defendant through his negligence had allowed to become defective, there was no evidence warranting a finding that the defendant owned the dam or was under any obligation to repair it. *Briggs v. Adams*, 262.

Where, at the trial of an action of tort for damages resulting from a break in a dam, it is a part of the plaintiff's case to prove that the title to the dam is in the defendant, it is within the discretion of the trial judge to refuse to permit the plaintiff to introduce in rebuttal evidence which tends merely to support that part of his case in chief and has no tendency to explain or control any evidence offered by the defendant. *Ibid.*

Of Value.

At the trial of a petition for the assessment of damages for land taken under St. 1908, c. 571, for the Mount Everett State Reservation, where the value

of the land was chiefly sentimental "as a sight seeing place," it was held to be within the discretionary power of the presiding judge to exclude evidence of the value of a parcel of land on the other side of the mountain without value as a mere sight seeing place but with value because of its wood and timber and because of its connection with other properties. *Macnaughtan v. Commonwealth*, 550.

At the same trial it was within the discretionary power of the presiding judge to exclude evidence of the price paid for the land taken under an option which was procured, by one who afterwards became a member of the commission in charge of the reservation and conveyed the land to the Commonwealth, for the purpose of showing to the Legislature the price for which the land could be bought. *Ibid.*

At the trial of a petition for the assessment of damages caused by the laying out of a private way as a public highway, it is proper for the presiding judge to permit the petitioner to testify what he considers was the fair market value of the land immediately before the order for the laying out of the street, such an owner being assumed to have a knowledge of his property adequate to form an intelligent estimate of its value. *Wooley v. Fall River*, 584.

EXCEPTIONS.

See appropriate subtitle under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL; PRACTICE, CRIMINAL.

EXECUTOR AND ADMINISTRATOR.

Where a suit in equity is brought in the Superior Court to establish the beneficial ownership of a plaintiff in certain savings bank deposits which stood in the name of one deceased as trustee, and the Probate Court has authorized a special administrator to appear and defend the suit, the Superior Court, on finding that the deposits are the property of the plaintiff, has authority to enter a decree ordering the special administrator to deliver the savings bank books to the plaintiff and ordering the banks thereupon to pay to the plaintiff the amounts of the deposits. *Meagher v. Kimball*, 32.

A suit in equity may be maintained by a creditor of one having an interest as legatee under a will to enforce an assignment by the legatee to the creditor and to compel the executor of the will to account to him for the amount covered by the assignment although, after notice of and assent to the arrangement, the executor has paid the legatee in full and his final account has been allowed. *Security Bank of New York v. Callahan*, 84.

Proper scope of inquiry on a petition by an administrator for distribution, and effect of agreements by the administrator that sums paid to one of the next of kin for his notes should be treated as advancements. *Case v. Clark*, 344.

EXPRESS.

Action of the mayor and aldermen of a city in issuing a permit for the transportation of spirituous and intoxicating liquors into or in such city, if such permit is in proper form, cannot be reviewed in quo warranto proceedings brought by the Attorney General against the person, firm or corporation who received the permit, although such person, firm or corporation is not

Express (continued).

"regularly and lawfully conducting a general express business" according to the requirement of St. 1906, c. 421, § 2; St. 1911, c. 423. *Attorney General v. Lyons*, 536.

Whether, under any circumstances such action of the mayor and board of aldermen could be reviewed in appropriate and seasonable proceedings, or whether the action is a practical detail in the administration of local affairs which, so long as honestly exercised, is vested finally in the mayor and board of aldermen, was not decided. *Ibid.*

St. 1906, c. 372, does not give the Supreme Judicial Court power to enjoin a corporation to which a permit has been granted in due form under St. 1906, c. 421, as amended by St. 1911, c. 423, for the transportation of spirituous and intoxicating liquors into or in a city, from conducting business in accordance with the permit, although the holder of the permit is not "regularly and lawfully conducting a general express business" according to the requirement of the amended § 2 of the statute. *Ibid.*

FALSE REPRESENTATIONS

See DECEIT.

FIRE.

Insurance against loss by fire, see INSURANCE, *Fire*.

Destruction of a lumber mill by fire was held under the terms of a certain contract to excuse delivery of lumber. *New England Concrete Construction Co. v. Shepard & Morse Lumber Co.* 207.

FRATERNAL BENEFICIARY CORPORATION.

Designation by a member of a Massachusetts fraternal beneficiary corporation and a holder of one of its death benefit certificates, after the death of his wife, of his cousin as the beneficiary under his certificate upon an agreement by the cousin that he will use the proceeds of the certificate to pay debts of the certificate holder and will hold the balance for the benefit of the certificate holder's children, which was held to be invalid against the objection of the children. *O'Brien v. Massachusetts Catholic Order of Foresters*, 79.

An agreement by a foreign fraternal beneficiary corporation, made in carrying out the terms of an attempted merger with a similar Massachusetts corporation, to assume, without a new physical examination of the member by a physician, the liability of the Massachusetts corporation under the provision of a death benefit certificate issued to one of its members, was held to be contrary to a certain statute of the State where such foreign corporation was incorporated and to be *ultra vires* and void so that the beneficiaries under the certificate had no remedy against the foreign corporation. *Ulman v. United Order of the Golden Cross*, 422.

A by-law of a Massachusetts fraternal beneficiary corporation, not printed on the certificate, fixing a limitation within which actions should be brought upon the certificate, was held to be reasonable and valid and binding upon the beneficiaries under the certificate in favor of a foreign corporation with

which the Massachusetts corporation had attempted to merge. *Ulman v. United Order of the Golden Cross*, 422.

It also was held that a delay in bringing an action on the certificate because of the pendency of a suit by another person which would determine certain questions as to the liability of the foreign corporation under the agreement of merger, where the foreign corporation did not assent to nor induce such postponement, did not waive the limitation. *Ibid*.

FRAUD.

Under the provision of the bankruptcy act of 1898, in § 70 e, no new right of the trustee in bankruptcy is created to avoid transfers of property made by the bankrupt but merely gives him authority to enforce the rights of creditors to avoid fraudulent transfers, if such have been made. *Holbrook v. International Trust Co.* 150.

Whether a particular transfer was or was not fraudulent as to creditors depends on the laws of the State that govern the transfer of the property in question. *Ibid*.

In order that a transfer of property or a payment of money may be avoided as having been made with the intent to hinder and delay creditors, it is not necessary that at the time of the transfer or payment the debtor should have been insolvent. *Ibid*.

A transfer or payment may be made by a debtor, who although in financial embarrassment is not insolvent, where the attendant circumstances show an intent to delay and defraud creditors. *Ibid*.

A finding of an auditor, that a firm of traders "were unable to pay their debts as they matured and became due and payable in the ordinary course of business as persons carrying on trade usually do," is evidence for a jury that a large payment of money made by this firm when they were in this condition was made with intent to hinder and delay their creditors. *Ibid*.

From an examination of certain findings of an auditor in an action by a trustee in bankruptcy under § 70 e of the bankruptcy act of 1898 to recover the amount of certain payments of money made by a bankrupt firm to the defendant as having been made with the intent to hinder and delay creditors, it was held that the auditor did not find that there was no intent to hinder and delay creditors. *Ibid*.

One who conspired with a creditor of an insolvent person to assist such creditor to receive a preference unlawful under the bankruptcy act of 1898 is liable in a suit in equity brought by the trustee in bankruptcy of such insolvent for the amount of a sum of money collected by him which was a part of such unlawful preference. *Rubenstein v. Lottow*, 156.

In a suit in equity by a trustee in bankruptcy to recover the amount of an alleged unlawful preference by the assignment by the bankrupt to the defendant of certain accounts receivable, where it appears that the assignment was in part for the purpose of enabling the bankrupt to continue in business for a sufficient length of time to prevent the trustee in bankruptcy, when appointed, from avoiding the assignment as a preference, this shows a fraud upon the law which entitles the trustee in bankruptcy to recover the amount of the assignment, in spite of the fact that the bankrupt may have received from the defendant the full value of the accounts assigned so that his estate was not diminished. *Ibid*.

Fraud (*continued*).

In such a suit the defendant cannot be allowed to contend that, if the assignment to him of the accounts receivable thus is to be set aside as in fraud of the law, he is entitled to recover the sums of money paid by him to the bankrupt when the assignment was made; because where one has committed a fraud upon the law he has no standing in court but is left by the law without a remedy in the position in which he put himself. *Rubenstein v. Lot-tow*, 156.

Statement of RUGG, C. J., of the principles of law which under the common law and St. 13 Eliz. c. 5 govern the conveyance of property by an insolvent husband to his wife in recognition of a trust, and which determine whether such conveyance is made with intent to defeat, delay and defraud creditors or is made in execution of a valid trust. *Hutchins v. Mead*, 348.

In a suit in equity against a woman by the administrator of her husband's estate, which was insolvent, to set aside certain conveyances made by the intestate to the defendant through an intermediary which were alleged to have been fraudulent against his creditors at common law and under St. Eliz. c. 5, it was held that a decree dismissing the bill should be sustained, because findings were warranted that the conveyances in question were made *bona fide* in execution of resulting trusts, and were not made with intent to hinder, delay or defraud creditors. *Ibid*.

Effect of certain fraudulent acts of a general agent of a life insurance company in alteration of notes and in exceeding the authority conferred upon him by persons who placed incomplete notes and assignments of life insurance policies in his possession in pledge or for use in making pledges. *Tower v. Stanley*, 429; *Munroe v. Stanley*, 438; *Stone v. Sargent*, 445.

An action of contract for money had and received to the plaintiff's use cannot be maintained against one who received and collected a check drawn by the plaintiff payable to the order of a non-existent corporation and delivered by the plaintiff to a fraudulent person and who in good faith paid over to such fraudulent person the whole proceeds of the check. *Burbank v. Farnham*, 514.

The allegations of a bill in equity by minority stockholders in a Massachusetts corporation against another stockholder, who held the majority of its stock and was alleged to be in control of it, averring fraudulent manipulation by the defendant of a Maine corporation, which the Massachusetts corporation succeeded in pursuance of a certain fraudulent purpose were held to set forth a case where the Massachusetts corporation, for whose benefit the suit was brought, was entitled to relief of some sort, the form of which it was not necessary then to determine. *Keith v. Radway*, 532.

FRAUDS, STATUTE OF.

Because it here was found as an inference of fact that the "Leonard Farm" in Greenfield, which was described fully in an agreement in writing made in 1909, was the same property referred to as the "Leonard Place" in another contract in writing made between the same parties in 1913 to convey that property, it followed that there was a contract or memorandum in writing sufficient to satisfy the statute of frauds in a suit in equity to enforce the performance of the contract to convey the property. *Noyes v. Bragg*, 106.

Where an oral contract is made for the sale of certain shares of stock for a price of more than \$50 and the seller agrees as a part of the contract of

sale that, if at any time the buyer wishes to return the shares, the seller will buy them back from him at the same price, and under this contract the shares are delivered to the buyer and are accepted and received by him, that is a satisfaction of the statute of frauds as to the entire contract. *Armstrong v. Orlor*, 112.

If the owner of a house makes a contract in writing with a prospective tenant whereby the prospective tenant agrees to occupy the house for a term of five years and later the parties modify this contract by an oral agreement by which the prospective tenant agrees to pay \$500 additional in rent, and the tenant enters and occupies for ten months but refuses to pay the additional rent, the statute of frauds is no defence to an action for such additional rent, there being under the circumstances a tenancy at will. *Freedman v. Gordon*, 324.

GAS COMPANY.

A gas company upon receiving permission from the board of mayor and aldermen of a city to dig a trench in a public way and to lay a pipe therein, is authorized to make use of the street under a public right. *MacGinnis v. Marlborough-Hudson Gas Co.* 575.

If, therefore, in digging the trench the company's contractor without negligence blasts a ledge which permits water collected in a surface depression on land near the way to flow into the cellar of the owner of other adjoining land, the company has violated no common law right of such owner and is not liable to him in an action of tort for alleged negligence. *Ibid.*

Whether the provision of R. L. c. 110, § 76, was designed to give to a landowner a cause of action where none existed at common law and to afford compensation for damage necessarily caused by work which is authorized by the statute and is executed in a reasonably proper manner, was not decided in an action of tort for alleged negligence. *Ibid.*

GASOLINE.

Action for death caused by the negligent disposal of gasoline. *Leaky v. Standard Oil Co. of New York*, 90.

GIFT.

The gift of a dog voluntarily delivered to the donee on the Lord's day is valid. *Herries v. Bell*, 243.

If the lawful possessor of a dog with the consent of its owner delivers it into the possession of its former owner and no more appears, it cannot be inferred that the purpose of this delivery was to revest the title in the former owner by way of gift, sale or otherwise, and such delivery creates at the highest a gratuitous bailment revocable at the pleasure of the bailor without demand or notice. *Ibid.*

Independently of St. 1910, c. 171, § 9, the delivery of an unindorsed certificate of shares in the capital stock of a corporation with the intention of making an immediate gift of the shares and the acceptance of the unindorsed certificate by the donee as his property pass to the donee the equitable title to the shares with the right to compel a formal assignment by the donor or

Gift (continued).

by the executor of his will after his death and thereafter a transfer on the books of the corporation. *Herbert v. Simson*, 480.

GOOD WILL.

Right of an awning maker, who had formed a corporation with a name which consisted of his own name with the word "Company" added, to which he had transferred his business including the good will, to resume business under his own name after the corporation had passed into the hands of a receiver and to compel a new corporation, which had been formed by purchasers from the receiver of all the former corporation's assets, including its "business, good will and trade names," to refrain from the use of his name. *C. H. Batchelder & Co. Inc. v. Batchelder*, 42.

GUARANTY.

Payment by a guarantor of a balance alleged to be due in an erroneous statement rendered by the creditor to the principal debtor was held under the circumstances to have effected neither a release nor a discharge of the principal debt nor any accord and satisfaction, and it was held that the principal debt and the guaranty remained in force. *Barber Asphalt Paving Co. v. Mullen*, 308.

Certain evidence at the hearing of a suit in equity by the creditor to enforce such guaranty, which, it was held, did not show that the guarantor was discharged, because the guarantor had failed to sustain the burden of proof, which was on him, of showing that, when notified of the creditor's error, he had lost any material pecuniary advantage against his principal which he might have enforced had no mistake been made by the creditor. *Ibid.*

GUARDIAN.

Jurisdiction and power of the Superior Court as to separation and separate maintenance of the parties to a libel for divorce, where it is determined that the divorce should not be granted, and as to the guardianship and custody of their minor children. *DeFerrari v. DeFerrari*, 38.

HIGHWAY.

See *WAY, Public.*

HOUSE OF ILL FAME.

A plea in bar to a complaint for keeping a common nuisance consisting of a tenement resorted to for prostitution during a period named, setting up under R. L. c. 205, § 6, an alleged acquittal upon the same charge, is not sustained by showing that a previous complaint upon a like charge covering a part of the same period was dismissed without a trial. *Commonwealth v. Anderson*, 142.

Proper instructions by the judge presiding at the trial of a complaint charging the defendant with keeping a common nuisance consisting of a tenement resorted to for prostitution, as to evidence that certain police officers made statements to the defendant which if believed by the jury had a tendency

to prove the offence charged and that the defendant denied these statements, and where it could be found that the defendant's denials were false and tended to show a consciousness of guilt. *Commonwealth v. Anderson*, 142.

HUSBAND AND WIFE.

R. L. c. 152, § 17, gives the Superior Court full jurisdiction, where after the hearing of a libel for divorce the conclusion is reached that a divorce should not be granted but that there ought to be a temporary separation of the parties or a maintenance of the wife separate and apart from the husband, to deal with the case as the interests of the parties may require and to make orders for the separate maintenance of the wife and the custody and support of minor children, which, while in force shall supersede any order or decree of the Probate Court under R. L. c. 153, § 33. *DeFerrari v. DeFerrari*, 38.

A decree of the Probate Court appointing a man and his wife joint guardians of their minor child is superseded, so far as it relates to the custody of the child, by a decree of the Superior Court, made in a divorce suit brought by the wife more than a year later, awarding to the wife the care and custody of such minor child and ordering the husband to make certain payments for the support of his wife and child. *Ibid.*

Under R. L. c. 152, §§ 16, 17, 25-28, the Superior Court, when a man and his wife are before it as the parties to a libel for divorce, becomes the court of domestic relations in matters affecting the welfare of the family and the care, custody and support of minor children. *Ibid.*

A wife, who under R. L. c. 153, § 33, has obtained a decree that she was deserted by her husband and is living apart from him for justifiable cause, by § 36 of the same chapter may convey her real property "in the same manner and with the same effect" as if she were sole. *Mackerman v. Fox*, 197.

Trust deed by a wife under such circumstances which was held to have given to the trustee a freehold estate in the property sufficient to maintain a writ of entry against the husband. *Ibid.*

And it was held that certain powers of revocation and appointment in the deed, if valid against the creditors of the grantor and against her husband in case he survived her, which here was not open to consideration, did not affect the present legal title to the trustee. *Ibid.*

Where a husband abandons his wife and she is compelled to support and care for a minor child of the husband and herself, she becomes entitled to collect such child's earnings, and, if he is injured through negligence of a third person, to maintain an action against such third person for the loss of the services of the child. *Tornroos v. R. H. White Co.* 336.

Statement by RUGG, C. J., of the principles of law which under the common law and St. 13 Eliz. c. 5 govern the conveyance of property by an insolvent husband to his wife in recognition of a trust, and which determine whether such conveyance is made with intent to defeat, delay and defraud creditors or is made in execution of a valid trust. *Hutchins v. Mead*, 348.

In a suit in equity against a woman by the administrator of her husband's estate, which was insolvent, to set aside certain conveyances made by the intestate to the defendant through an intermediary which were alleged to have been fraudulent against his creditors at common law and under St. 13 Eliz. c. 5, it was held that a decree dismissing the bill should be sustained,

Husband and Wife (*continued*).

because findings were warranted that the conveyances in question were made *bona fide* in execution of resulting trusts, and were not made with intent to hinder, delay or defraud creditors. *Hutchins v. Mead*, 348.

Action for the conversion of household goods delivered for storage by the plaintiff to the defendant, who contrary to the plaintiff's express instructions delivered the goods to the plaintiff's wife. *Greenall v. Hersum*, 278.

ICE.

A combination of ice dealers in a territory in and near which are waters suitable for obtaining ice readily available to any one wishing to go into the business, made by means of contracts by which these dealers agree to dispose of their plants for the delivery of ice and to sell their ice to a delivery company that maintains the necessary wagons and plant for delivering ice to the consumers, is not a monopoly of gathering, storing, selling or delivering ice under St. 1908, c. 454. *Commonwealth v. North Shore Ice Delivery Co.* 55.

And where the competition of other ice dealers in the territory, instead of being diminished by the formation of this arrangement for delivery, has increased since that formation, there is under that statute no restraint of competition nor prevention of any person from the free pursuit of the lawful business of gathering, storing, selling or delivering ice in the territory in question. *Ibid.*

INDEMNITY.

Indemnity for loss and expense due to an abandoned or void taking, see appropriate subtitle under DAMAGES.

INDUSTRIAL ACCIDENT BOARD.

Jurisdiction of, see appropriate subtitle under WORKMEN'S COMPENSATION ACT.

INSOLVENCY.

The rule, that a trader who does not meet his obligations as they mature in the ordinary course of business is insolvent, does not apply to persons who are not traders. *Holbrook v. International Trust Co.* 150.

Statement by Rugg, C. J., of the principles of law which under the common law and St. 13 Eliz. c. 5 govern the conveyance of property by an insolvent husband to his wife in recognition of a trust, and which determine whether such conveyance is made with intent to defeat, delay and defraud creditors or is made in execution of a valid trust. *Hutchins v. Mead*, 348.

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Claims of the lessor or licensor under certain agreements in writing, in the nature of leases or licenses of machinery, for return charges and charges

for repairs and cartage were held not to be claims which he had a right to prove against the estate in the hands of the assignee for the benefit of the creditors of the lessee, because they were not debts "absolutely due" under R. L. c. 163, § 31, at the time of the assignment. *Shaw v. United Shoe Machinery Co.* 486.

Compare, also, for a similar decision under the provisions of the national bankruptcy act, *Cotting v. Hooper, Lewis & Co. Inc.* 273.

INSURANCE.

Life.

Under St. 1912, c. 524, permitting certain foreign life insurance companies under certain circumstances to insert in their life insurance contracts provisions for certain features of accident insurance, a policy of life insurance proposed by such a company is in proper form if, after a provision in which the permitted elements of accident insurance are included, it states, "This provision is granted without additional cost to the insured." *Metropolitan Life Ins. Co. v. Insurance Commissioner*, 52.

A by-law of a Massachusetts fraternal beneficiary corporation, not printed on the certificate, fixing a limitation within which actions should be brought upon the certificate, was held to be reasonable and valid and binding upon the beneficiaries under the certificate, in favor of a foreign corporation with which the Massachusetts corporation had attempted to merge. *Ulman v. United Order of the Golden Cross*, 422.

It also was held that a delay in bringing an action on the certificate because of the pendency of a suit by another person which should determine certain questions as to the liability of the foreign corporation under the agreement of merger, where the foreign corporation did not assent to nor induce such postponement, did not waive the limitation. *Ibid.*

Assignment of policy, see ASSIGNMENT, *Of Insurance Policy.*

Fire.

In an action on a policy of fire insurance to recover for the loss by fire of an automobile, which was described in the application and the policy by many details, where the defendant contended that the description was wrong in one particular, because the car was of a year other than that stated in the description, and that the policy was invalid, either because the minds of the parties never met in regard to the terms of the policy, or if they did, the contract was rendered void by the plaintiff's misrepresentation of a material fact, it was held that on conflicting evidence the case properly was submitted to the jury. *Locke v. Royal Ins. Co. Ltd.* 202.

Accident.

Under St. 1912, c. 524, permitting certain foreign life insurance companies under certain circumstances to insert in their life insurance contracts provisions for certain features of accident insurance, a policy of life insurance proposed by such a company is in proper form if, after a provision in which the permitted elements of accident insurance are included, it states, "This provision is granted without additional cost to the insured." *Metropolitan Life Ins. Co. v. Insurance Commissioner*, 52.

On Goods during Transportation.

The skidding of the hind wheels of an automobile truck into a gutter when the truck is being operated upon a public highway, so that the truck is caused to capsize and its contents to be injured, is not a "derailment" of the truck within the meaning of that word as used in a policy of insurance of the contents of the truck during transportation "against loss or damage by fire, collision or derailment on land." *Graham v. Ins. Co. of North America*, 230.

INTEREST.

In a suit in equity to enforce the specific performance of a contract in writing to convey certain real estate to the plaintiff for \$1,000 "with interest from date," the plaintiff to pay \$25 in each month until the price was paid in full and to pay insurance and taxes, a decree ordering the defendant to deliver a deed of the property to the plaintiff on payment by the plaintiff of the full amount of the purchase money, with interest from the date of the agreement until the date of the filing of the bill, was held to be erroneous. *Noyes v. Bragg*, 106.

Liability under certain circumstances of the maker of a promissory note, which contained no agreement as to interest and which had been altered fraudulently by the insertion of a rate of interest, to pay to a holder in due course interest in accordance with an oral agreement made by him and the fraudulent person to whom he first had delivered the note. *Tower v. Stanley*, 429.

INTERROGATORIES.

Although in an action begun by trustee process, the answers of one summoned as trustee to interrogatories propounded to him by the plaintiff must be accepted as true and cannot be contradicted, and he cannot be subjected through interrogatories to cross-examination, yet the alleged trustee can be required in answer to interrogatories to testify with reasonable minuteness as to the subject under investigation. *MacAusland v. Taylor*, 265.

Further interrogation which was permitted after an alleged trustee had answered that "the entire balance remaining" in his hands and belonging to the principal defendant "was paid over in full to the principal defendant" with the exception of a sum equal to one half of the amount claimed by the plaintiff, which was held back to be paid to him. *Ibid*.

Whether an appeal, taken by one alleged to be a trustee in an action begun by trustee process before final judgment is entered from an order that the trustee be defaulted for failure to obey an order of the court directing him further to answer certain interrogatories of the plaintiff, was taken prematurely, was not decided. *Ibid*.

INTOXICATING LIQUOR.

Transportation.

Action of the mayor and aldermen of a city in issuing a permit for the transportation of spirituous and intoxicating liquors into or in such city, if such permit is in proper form, cannot be reviewed in quo warranto proceedings brought by the Attorney General against the person, firm or corporation

who received the permit, although such person, firm or corporation is not "regularly and lawfully conducting a general express business" according to the requirement of St. 1906, c. 421, § 2; St. 1911, c. 423. *Attorney General v. Lyons*, 536.

St. 1906, c. 372, does not give the Supreme Judicial Court power to enjoin a corporation to which a permit has been granted in due form under St. 1906, c. 421, as amended by St. 1911, c. 423, for the transportation of spirituous and intoxicating liquors into or in a city, from conducting business in accordance with the permit, although the holder of the permit is not "regularly and lawfully conducting a general express business" according to the requirement of the amended § 2 of the statute. *Ibid*.

Whether, under any circumstances such action of the mayor and board of aldermen could be reviewed in appropriate and seasonable proceedings, or whether the action is a practical detail in the administration of local affairs which, so long as honestly exercised, is vested finally in the mayor and board of aldermen, was not decided. *Ibid*.

Unlawful Keeping with Intent to Sell.

Upon a complaint under R. L. c. 100, § 1, for keeping intoxicating liquors in a certain town with intent to sell them unlawfully, evidence, which warranted a finding that the defendant in violation of R. L. c. 100, § 49, as amended by St. 1912, c. 201, made a delivery of the intoxicating liquors in the town in question which under the terms of that statute must be deemed to have been a sale, is evidence that he kept the liquors illegally. *Commonwealth v. Cronan*, 467.

At the trial of a complaint under R. L. c. 100, § 1, against a person carrying on a general express business for keeping intoxicating liquors, shipped from Providence, Rhode Island, in a certain town with intent to sell them unlawfully, a bill of lading issued by the shipper of a Providence express company, containing the names and addresses of four persons other than the defendant, opposite each of which were written in figures certain quantities of liquor, was held under the circumstances properly to have been admitted in evidence solely to show that the intoxicating liquors were at the time of the alleged offence in the town in which they were alleged to have been kept with unlawful intent. *Ibid*.

In the same case a freight receipt for the intoxicating liquors in question signed "Interstate Express Co. by" the initials of a person who the evidence tended to show was an employee of the defendant and took the packages of liquors from the Providence express company was held, in connection with other evidence, to be admissible to show that the liquors came into the possession and control of the defendant. *Ibid*.

At the same trial, the Commonwealth, to prove the defendant's unlawful intent, sought to prove also an illegal transportation of intoxicating liquors by him, and certain pages of a book where he kept and which was such a book as was required by the statutes in case the town in question was a no-license town, headed "Liquor Shipments delivered at no-license cities and towns in Massachusetts," was held to be admissible as an admission by the defendant that the town in question was a no-license town and that he had delivered liquor there. *Ibid*.

At the trial of a complaint under R. L. c. 100, § 1, for keeping intoxicating

Intoxicating Liquor (*continued*).

liquors with intent to sell them unlawfully, evidence that certain packages in the possession of the defendant were marked "Ale and Porter" is competent to show that the packages contained those liquors. *Commonwealth v. Cronan*, 467.

At the trial of a complaint under R. L. c. 100, § 1, for keeping intoxicating liquors with intent to sell them unlawfully, ale and porter by § 2 of the same chapter are to be deemed intoxicating liquors. *Ibid*.

INVITED PERSON.

See that subtitle under NEGLIGENCE.

JOINT TORTFEASORS.

Where at the trial of an action for conscious suffering and death the judge refuses to rule that, if negligence of an employee of the defendant and of the employer of the plaintiff's intestate were contributory proximate causes of the accident, the plaintiff is entitled to a verdict, and instead leaves it to the jury to determine which of the two was the cause of the accident, exceptions to such rulings must be sustained. *Leahy v. Standard Oil Co. of New York*, 90.

JUDGMENT.

A decree of the Probate Court appointing a man and his wife joint guardians of their minor child is superseded, so far as it relates to the custody of the child, by a decree of the Superior Court, made in a divorce suit brought by the wife more than a year later, awarding to the wife the care and custody of such minor child and ordering the husband to make certain payments for the support of his wife and child. *DeFerrari v. DeFerrari*, 38.

A decree of the Probate Court allowing a final account of an executor of a will showing payments by him to a legatee is no bar to a suit in equity by a creditor of the legatee to compel the executor to account to him for the amount of a partial assignment of the legacy of which the executor had notice and to which he assented before he made any payment to the legatee. *Security Bank of New York v. Callahan*, 84.

Where the counsel for a bankrupt, after having appeared to defend an action of contract against the bankrupt, withdrew from the case without the defendant's knowledge and did not set up the defence of the defendant's discharge in bankruptcy, by reason of which the defendant without his knowledge was defaulted and afterwards was arrested on execution, whether the bankrupt, upon discovering what had happened in the case, could have had the judgment against him vacated upon a petition for review under R. L. c. 193, §§ 22-37, and then could have pleaded his discharge in bankruptcy, was referred to as a question that was not passed upon. *Herschman v. Justices of the Municipal Court of the City of Boston*, 137.

Also, whether, if the bankrupt could show that the judgment against him had been obtained fraudulently, a court of equity would enjoin the judgment creditor from attempting to enforce it, was referred to as not passed upon. *Ibid*.

If, while a judge of the Superior Court has the allowance of a bill of exceptions under consideration, the clerk of court, without any preliminary warning

notice to the parties and erroneously thinking that he was acting under Rule 64, enters a judgment on which execution is issued, upon a motion of the excepting party an order will be made that the record shall be amended by striking out all matters relating to the judgment and the issuing of execution, such entries having been made by the clerk without authority. *Farris v. St. Paul's Baptist Church*, 356.

In an action on certain promissory notes against an indorser, whose defence was that he indorsed the notes without consideration at the request and for the accommodation of the plaintiff, the record of a judgment against the defendant in a certain action which he had brought against the plaintiff on an independent demand, and before bringing which he had claimed the right to set off that demand against his liability on the notes, was held not to be admissible to impeach his credibility, because that judgment settled only the controversy then on trial, and did not affect the present issue either by estoppel or as an admission. *Connors Brothers Co. v. Sullivan*, 600.

JUNK DEALER.

One who sells to a licensed junk dealer junk and old metals on sixteen different dates within two months, but who keeps no shop in the city in which the sales are made, may be found to be a "dealer" in junk and old metals in that city within the meaning of R. L. c. 102, § 29, providing that such a dealer may be required by a city ordinance to be licensed. *Commonwealth v. Silberman*, 552.

JURISDICTION.

On the filing of a petition and a proper bond under the Judicial Code, U. S. St. 1911, c. 231, §§ 28, 29, for the removal of an action of tort from the Superior Court to the District Court of the United States, the provision of § 29, that "It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit," must be obeyed, although the petition contains no allegation that "written notice of said petition and bond for removal" were "given the adverse party or parties prior to filing the same" as required by the statute. *Booki v. Pullman Co.* 71.

The want of such notice is a matter of defence to the petition for removal, which can be asserted or waived upon a motion in the United States District Court to remand the case to the State court. *Ibid.*

In an action against a foreign railroad corporation begun by trustee process, if there has been no personal service on the defendant and no direct attachment of property of the defendant, a valid judgment can be entered only against the property attached by trustee process, and, if the alleged trustee is not chargeable, the case must be dismissed. *Koontz v. Baltimore & Ohio Railroad*, 285.

A court of record has ample power to correct mistakes in its records by ordering the striking out of entries made by the clerk of the court without authority. *Farris v. St. Paul's Baptist Church*, 356.

EQUITY JURISDICTION, see that title.

Of Industrial Accident Board, see appropriate subtitle under WORKMEN'S COMPENSATION ACT.

Jurisdiction (continued).

Of Probate Court, see PROBATE COURT, *Jurisdiction*.

Of SUPERIOR COURT, see that title.

Of SUPREME JUDICIAL COURT, see that title.

KEEPING INTOXICATING LIQUOR WITH UNLAWFUL INTENT.

See appropriate subtitle under INTOXICATING LIQUOR.

LABOR.

The Legislature acting as the representative of the Commonwealth and its governmental subdivisions may determine as an employer the number of hours that shall constitute a day's labor for all those with whom the Commonwealth or any such subdivision makes contracts of employment. *Woods v. Woburn*, 416.

The provision of St. 1899, c. 344, that eight hours shall constitute a day's work for all laborers, workmen and mechanics employed by or on behalf of any city or town in this Commonwealth that accepts the act, does not make invalid a contract of a fireman of a pumping station of the water department of a city that had accepted the act with the water commissioner of the city to work ten hours each day of the week for \$16 a week. *Ibid*.

It seems, that under the Fourteenth Amendment to the Constitution of the United States the constitutionality of a statute which should undertake to annul a contract of a workman or mechanic to work more than a certain number of hours in a day would be open to grave doubt. *Ibid*.

A statute, which should prohibit, under a heavy penalty, a railroad corporation from discharging or disciplining an employee in consequence of information relating to the employee's conduct until such employee shall have been given an opportunity to make a statement in the presence of the person or persons furnishing the information, would be unconstitutional. *Opinion of the Justices*, 627.

LACHES.

See that subtitle under EQUITY JURISDICTION.

LAND COURT.

Where a case was brought before this court by an "appeal from the finding and decision" of the Land Court, and the paper entitled "Decision" was a simple finding of facts with a narration of some evidence, on which it could not be determined whether the conclusion of the judge was warranted or not, and, although there was a reference to certain plans, they were not made a part of the record, and no ruling of law appeared to have been made, or, if any was made, it was not brought before this court for review, no question of law being raised upon the record, it was ordered that the appeal be dismissed. *Mitchell v. Cobb*, 80.

Whether under the procedure of the Land Court a "decision" of that court is something more than a finding of facts in an action of law and is a matter from which an appeal can be taken, was mentioned as a question that was not decided. *Ibid*.

LANDLORD AND TENANT.

Construction of Lease and Covenants.

Construction of the covenants in and provisions of a lease to a banking corporation of a two story building on Devonshire Street in Boston upon which it was held, as to a party wall which formed part of the building and of a building on an adjacent lot and was six stories in height, that all the lessor's interest in the party wall was conveyed to the lessee for the term of the lease, and that the lessor had no right to compel either the lessee or the owner of the adjoining building to close openings for windows placed with the lessee's permission in the wall above the line of the roof of the bank building. *Torrey v. Parker*, 520.

Under the circumstances the giving by such lessee to the owner of the adjoining building of permission to use the party wall above the roof line of the banking building for the purpose of placing the windows there for the adjoining building is not a violation of the promise of the lessee that the demised premises shall be used "only as a banking house," such use of the wall being incidental and subsidiary to and not inconsistent with the exclusive use of the premises for a banking house. *Ibid*.

A covenant in a lease to a manufacturer of paints, shellac and oils, which he mixed and kept in the basement of the leased premises, that the lessee "will, at the expiration of this lease, remove all rubbish . . . and peacefully yield up . . . the premises . . . clean and in good repair, order and condition in all respects," is not repugnant to another covenant preceding it in the same lease, that the lessee will maintain the premises "in such repair, order and condition as the same are in at the commencement of said term, or may be put in during the continuance thereof." *Weeks v. Wilhelm-Dexter Co.* 589.

Consequently, if at the end of the term the floors of the leased premises are covered with a thick, irremovable, mucilaginous deposit that had accumulated during the terms of previous leases to the same lessee and was there at the beginning of this term, the lessee on giving up the premises is liable for the cost of putting the floors in good order and condition. *Ibid*.

Covenant for Renewal of Lease.

Suit in equity by a sublessee against the general lessee of a building to enforce specific performance of a covenant of renewal of the lease which would extend the term beyond the term of the general lessee, where the general lessor accepted a surrender of the general lease before the end of its term. *Albani v. Evening Traveler Co.* 20.

In a suit in equity, in determining the equivalent in money of the plaintiff's right to a renewal of a lease of a barber's shop in which he carried on a thriving and increasing business, the plaintiff's testimony may furnish some basis for determining the profits of his business, although no books of account were kept. *Ibid*.

Tenancy at Will.

A person, who enters into the occupation of a tenement in a building under an oral agreement for a lease, on which no action could be maintained if R. L. c. 74, § 1, cl. 4, were set up in defence, becomes a tenant at will by force

Landlord and Tenant (continued).

of R. L. c. 127, § 3, and the terms of the oral agreement become binding on both parties to it. *Flanagan v. Welch*, 186.

If the owner of a house makes a contract in writing with a prospective tenant whereby the prospective tenant agrees to occupy the house for a term of five years, and later the parties modify this contract by an oral agreement by which the prospective tenant agrees to pay \$500 additional in rent, and the tenant enters and occupies for ten months but refuses to pay the additional rent, the statute of frauds is no defence to an action for such additional rent, there being under the circumstances a tenancy at will. *Freedman v. Gordon*, 324.

In the action described above it was not necessary to decide whether the plaintiff could recover the additional rent under the doctrine of substituted performance put forward in *Cummings v. Arnold*, 3 Met. 486. *Ibid.*

Subletting.

The lessee of a barber's shop under a sublease containing the ordinary covenants from a corporation publishing a newspaper, which is the general lessee of the whole building, commits no breach of his lease by permitting a tailor and a bootblack temporarily to occupy an unimportant part of the shop, this not being a subletting but at most a revokable license to do something subsidiary or ancillary to the main purpose for which the shop is occupied by the lessee. *Albani v. Evening Traveler Co.* 20.

Upon acceptance by the owner of a building of a surrender of a lease of the whole building from the general lessee while there is outstanding a sublease of a shop in the building containing a covenant for renewal made by the general lessee and good against him, the owner takes subject to the covenant in the sublease of the shop, and the sublessee in a suit in equity against such owner can enforce the specific performance of such covenant for renewal or can recover its equivalent in damages. *Ibid.*

If the general lessee of a building gives to a subtenant a lease of a shop in the building containing a covenant for renewal at the same rent as that fixed by the lease for three years beyond the term of the general lessee's own lease, and thereafter the general lessee takes a new lease of the whole building for a term of three years beyond the end of the term of his former lease at an advanced rent, this does not relieve the general lessee from the obligation of his covenant for renewal in the lease of the shop. *Ibid.*

Party Wall.

Construction of a lease as to the rights of the lessor and the lessee in a party wall. *Torrey v. Parker*, 520.

In a suit in equity by the owner of land with a two story building thereon and with a party wall standing upon it and adjoining land extending several stories above that building, against the lessee of the two story building and the owner of the adjoining building to enforce an alleged right to have openings, which had been made in the wall for windows, closed, it was held that conduct of the lessee did not estop him to deny the lessor's right in the wall. *Ibid.*

In the same suit, it was held that it was a proper subject for a cross bill by the owner of the adjoining building against the plaintiff and one to whom he had

conveyed his right in the party wall to seek to compel the removal of shutters placed by them over the openings in the wall. *Torrey v. Parker*, 520.

Ratification of Unauthorized Lease and Covenant for Renewal.

Failure of the general lessee of a building to disavow an unauthorized lease and covenant for renewal, executed in his behalf by an agent, as soon as he had knowledge of them, and permitting the sublessee to continue his occupancy and the agent to collect the monthly rent in checks made payable to the general lessee, were held to warrant a finding that the general lessee ratified the act of the agent in executing the lease with the covenant for renewal. *Albani v. Evening Traveler Co.* 20.

Surrender.

Where in a suit in equity it was plain on the evidence that a certain lease had been surrendered by the lessee and that its surrender was accepted by the lessor, it was held that a contention, that this constituted in effect an entry for breach of condition, could not prevail against the findings of a master to the contrary. *Albani v. Evening Traveler Co.* 20.

Upon acceptance by the owner of a building of a surrender of a lease of the whole building from the general lessee while there is outstanding a sublease of a shop in the building containing a covenant for renewal made by the general lessee and good against him, the owner takes subject to the covenant in the sublease of the shop. *Ibid.*

Entry for Breach of Covenants.

Where in a suit in equity it was plain on the evidence that a certain lease had been surrendered by the lessee and that its surrender was accepted by the lessor, it was held that a contention, that this constituted in effect an entry for breach of condition, could not prevail against the findings of a master to the contrary. *Albani v. Evening Traveler Co.* 20.

Elevator.

In an action against the owner of a three tenement house for causing the death without conscious suffering of a child of a tenant occupying the first floor, where it appeared that the child was struck, while in a common passageway in the cellar, by the falling upon him of a small elevator or dumb waiter which ran from the cellar through a shaft to the top floor, there being no inclosure about it in the cellar, it was held that on the evidence the defendant owed to the members of the family of the tenant occupying the first floor and using the passageway in the cellar the duty of keeping the elevator in as good condition as it appeared to be at the beginning of his tenancy. *Shea v. McEvoy*, 239.

Common Stairway.

The rule, now established, that common hallways and stairways of a building which is let out in offices or tenements remain in the control of the landlord for the use of his tenants and that it is his duty to each tenant to keep them in the same condition or apparent condition as to safety in which they were at the beginning of the several leases or lettings to the respective tenants,

Landlord and Tenant (continued).

is founded on an implied agreement to that effect arising out of the necessities of the case. *Flanagan v. Welch*, 186.

Where the owner of two adjoining three story buildings, each used on the ground floor as a store and in the two upper stories for tenements, in making a lease of the whole of one of the buildings, which included the control of the stairways, reserved "the right to use in common with the lessee the entrance and stairway leading to the second story of said building," it was held, that in regard to the common use of this stairway the lessor was on the same footing as if he had been a tenant of the lessee. *Ibid.*

The implied agreement, arising from the necessities of the case, by which a landlord remains in control of the common stairways of a building used for offices or tenements, applies where the common stairways are used by a few tenants, even if there are only two of them, as well as where they are used by a great number of tenants. *Ibid.*

In the above case, where it appeared that no janitor was employed to take care of the stairways, an agreement made by a tenant of the two upper stories of the first of the buildings, who made use of the stairway mentioned, with the agent of such owner, that such tenant should take turns with the tenants of the lessee of the adjoining building on the second floor of that building in washing the stairs, was held not to affect the control of the stairway or the liability of the person in such control for injuries caused by his failure to keep the stairway in a safe condition. *Ibid.*

Where the owner of a building promised a tenant at will occupying a tenement in the building, as a part of the oral agreement under which the tenant hired the tenement, that he would keep a stairway which the tenant was to use in the same safe condition that it was in at the beginning of the tenancy, the tenant can recover from such owner for personal injuries caused by a failure to keep the stairway in that condition. *Ibid.*

To such an action it is no defence that, when the defendant made the oral agreement and also at the time of the plaintiff's injuries, the defendant had parted with the control of the stairway to the tenant of the adjoining building, which also was owned by the defendant, if the plaintiff was not informed of this fact when the defendant made the oral agreement with the plaintiff which assumed that the defendant was in control of the stairway. *Ibid.*

In an action by a woman against the person in control of a building and of its common stairways for personal injuries caused by a defect in a back stairway which the plaintiff was descending after having made some purchases at a meat market of a tenant on the street floor of the building, it was held that there was evidence warranting findings that the plaintiff was using the stairway by invitation, that the defendant knew of the use which his tenant's customers were making of the stairs from the time the tenancy began, and that such use was contemplated by the defendant under the original letting, so that the defendant could be held liable to the plaintiff for any neglect of proper precautions to keep the stairway in as good condition as it was in, or had appeared to be in, at the time of the letting. *Fitzsimmons v. Hale*, 461.

Landlord's Liability for Assault and Battery by his Servant in ejecting Tenant.

In an action of tort for an assault and battery, the record of a suit in equity, brought by the plaintiff against the defendant immediately after the as-

sault in question, in which the trial judge found that "the defendant's servants unjustifiably assaulted the plaintiff" by committing the assault in question, was held to be admissible in evidence and conclusively to establish the fact that an unjustifiable assault was committed upon the plaintiff by a person who at such time was the servant of the defendant. *Coughlin v. Rosen*, 220.

In the same action it was held that from certain instructions given by the defendant to his attorney, it could be found that the assault with a heavy iron bar was committed by the defendant's servant who accompanied the attorney for the purpose and as a means of obtaining and holding possession of certain premises, and that the servant was acting within the scope of his employment. *Ibid.*

Liability for Personal Injuries to Tenant or to Person with his Rights.

For cases of actions by tenants or persons having rights as tenants against landlords for personal injuries, see the subtitles, *ante*, *Elevator, Common Stairway*, and under the title, NEGLIGENCE, *Of one owning or controlling Real Estate*.

LAND REGISTRATION.

See LAND COURT.

LAWRENCE.

A certain letter, written and signed by the director of public safety of the city of Lawrence and addressed to and served upon a sergeant of police of that city under authority of the provision of the city charter contained in St. 1911, c. 621, Part II, § 43, it was held, fairly might be construed to mean that the writer had decided on the day of its date to reduce the rank of the officer and that the decision would take effect two days later. *O'Brien v. Cadogan*, 578.

If such sergeant of police of the city of Lawrence was entitled to a notice under the provisions of the civil service law contained in Sts. 1904, c. 314, § 2; 1906, c. 210, it was held that a notice of two days was a reasonable one which could be found to have afforded him ample time to ask for a public hearing. *Ibid.*

LEGACY.

See DEVISE AND LEGACY.

LIBEL AND SLANDER.

The privilege which protects the former employer of a domestic servant from liability in an action for slander in answering inquiries in regard to the character and capabilities of such former servant is confined to answers that are made in good faith and without malice in fact. *Doane v. Grew*, 171.

Malice in fact which destroys the defence of privilege must be taken to mean that the defamatory words, although spoken on a privileged occasion, were not spoken pursuant to the right or duty which created the privilege but were spoken from some other motive. *Ibid.*

In an action for slander evidence of a repetition in substance of the alleged slander is admissible to show malice. *Ibid.*

Libel and Slander (*continued*).

Where the former employer of a domestic servant answers inquiries from prospective employers in regard to the character and capabilities of such former servant, he does not perform his whole duty to the inquirer if he confines himself to facts of which he has personal knowledge or to giving information which he has investigated fully. *Doane v. Grew*, 171.

It is his duty to impart any material information that he has received, even if he has not attempted to investigate it at all, and he cannot be held liable in an action for slander for performing this duty in good faith. *Ibid.*

And, if he ought not to have believed the reported fact or was reckless and careless in believing it, this does not make him liable for giving in good faith the information that the needs of the privileged occasion called for. *Ibid.*

Evidence, in an action by a nursery maid against a former employer for alleged slander in answering inquiries in regard to the plaintiff's character and capabilities while in the defendant's employ, that the plaintiff had applied to two women for a position as nursery maid and had referred them to the defendant and that in each case she afterwards had received word that her services were not required which, it was held, ought not to be admitted at a new trial which was ordered. *Ibid.*

Evidence in such an action which, it was held, tended to show that the defendant was angry with the plaintiff and was sufficient evidence of malice to entitle the plaintiff to go to the jury, where she already had introduced evidence tending to show that the defendant in answering inquiries had made statements in regard to the plaintiff that were not in fact true. *Ibid.*

In such an action it is wrong for the presiding judge to instruct the jury that "the burden is upon the defendant to show that [the words spoken by the defendant] were privileged words, for which she is not answerable." *Ibid.*

On the contrary, where the occasion is shown to have been a privileged one, the burden is on the plaintiff to prove malice. *Ibid.*

LICENSE.

In construing the word "dealer" in a statute requiring dealers in certain articles to be licensed there would seem to be no valid distinction between one who sells and one who buys such articles. *Commonwealth v. Silverman*, 552.

One who sells to a licensed junk dealer junk and old metals on sixteen different dates within two months, but who keeps no shop in the city in which the sales are made, may be found to be a "dealer" in junk and old metals in that city within the meaning of R. L. c. 102, § 29, providing that such a dealer may be required by a city ordinance to be licensed. *Ibid.*

As to licenses for the transportation of intoxicating liquors into or in cities and towns in which licenses of the first five classes for the sale of intoxicating liquors are not granted, see INTOXICATING LIQUOR, *Transportation*.

LIMITATIONS, STATUTE OF.

Unsuccessful bringing of a suit in equity by one holding land adversely, which under the circumstances was held not to stop the running of the statute of limitations against the holder of the record title to the land. *Endicott v. Haviland*, 48.

Where a person, who has paid the purchase price for a certain lot of land and is entitled to a deed under a contract in writing, repeatedly waives immedi-

ate performance by the seller on account of the absence of necessary parties for a period of twelve years and then demands a deed which the seller refuses, he has a right to rescind the contract of sale and to recover the purchase money paid by him, the delay in making his final demand for a deed not being due to his own fault and the statute of limitations not beginning to run until his final demand was refused. *Fletcher v. Storer*, 245.

A by-law of a Massachusetts fraternal beneficiary corporation, not printed on the certificate, fixing a limitation within which actions should be brought upon the certificate was held to be reasonable and valid and binding upon the beneficiaries under the certificate in favor of a foreign corporation with which the Massachusetts corporation had attempted to merge. *Ulman v. United Order of the Golden Cross*, 422.

It also was held that a delay in bringing an action on the certificate because of the pendency of a suit by another person which should determine certain questions as to the liability of the foreign corporation under the agreement of merger, where the foreign corporation did not assent to nor induce such postponement, did not waive the limitation. *Ibid*.

LORD'S DAY.

The gift of a dog voluntarily delivered to the donee on the Lord's day is valid. *Herries v. Bell*, 243.

MALICE.

Rules as to malice in an action for slander. *Doane v. Grew*, 171.

MANDAMUS.

Issuance of a writ of mandamus, upon a petition of a minority stockholder in a "one man" corporation, commanding the corporation and the holder of the majority of its stock, who also was its president and treasurer, to permit the petitioner to examine the corporate books and records. *Butler v. Martin*, 224.

Upon such a petition the fact, that the petitioner's request is connected with a controversy between him and the individual respondent as to an alleged agreement of that respondent to buy back the petitioner's stock, will not prevent the court from issuing the writ to enforce the right of inspection, if it appears that the petitioner is acting in good faith and that his purpose is not hostile to the interests of the corporation. *Ibid*.

MANUFACTURED ARTICLE.

See DANGEROUS ARTICLE OF MERCHANDISE.

MARRIAGE AND DIVORCE.

Jurisdiction and power of the Superior Court as to separation and separate maintenance of the parties to a libel for divorce, where it is determined the divorce should not be granted, and as to the guardianship and custody of their minor children. *DeFerrari v. DeFerrari*, 38.

Married Woman.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability*; WORKMEN'S COMPENSATION ACT.

MEMORANDA.

Resignation of Justice Sheldon, 83.

Appointment of Justice Carroll, 182.

MONOPOLY.

A combination of ice dealers in a territory in and near which are waters suitable for obtaining ice readily available to any one wishing to go into the business, made by means of contracts by which these dealers agree to dispose of their plants for the delivery of ice and to sell their ice to a delivery company that maintains the necessary wagons and plant for delivering ice to the consumers, is not a monopoly of gathering, storing, selling or delivering ice under St. 1908, c. 454. *Commonwealth v. North Shore Ice Delivery Co.* 55.

And where the competition of other ice dealers in the territory, instead of being diminished by the formation of this arrangement for delivery, has increased since that formation, there is under that statute no restraint of competition nor prevention of any person from the free pursuit of the lawful business of gathering, storing, selling or delivering ice in the territory in question. *Ibid.*

The contracts, agreements, arrangements or combinations in violation of the common law which under St. 1908, c. 454, the Attorney-General by a suit in equity in the name of the Commonwealth may enjoin are of three classes: first, those that establish or maintain a monopoly in the manufacture, production or sale in this Commonwealth of any article or commodity in common use, second, those that prevent or restrain competition in the manufacture, production or sale of any such article or commodity, and, third, those that by establishing or maintaining such a monopoly prevent or restrain the free pursuit in the Commonwealth of any lawful business, trade or occupation. *Ibid.*

Under that statute, the power of a combination of dealers to enhance "temporarily" the price of an article in a certain territory is not decisive to show a violation of the statute. *Ibid.*

And an advantage obtained by superior business efficiency, which makes it more difficult for another person to enter that business because he must compete with the results of such efficiency, is not within the prohibition of the statute. *Ibid.*

Trading stamps and trading stamp books, into which the stamps are to be pasted for the purpose of presenting the books for redemption by the corporation that issues them, are "articles" within the meaning of St. 1908, c. 454, § 1, which prohibits "a monopoly in the manufacture, production or sale in this Commonwealth of any article or commodity in common use." *Merchants Legal Stamp Co. v. Murphy*, 281.

A court of equity, because of the monopoly sought to be established contrary to the provisions of St. 1908, c. 454, § 1, refused to enforce the restriction contained in certain contracts between a corporation issuing trading stamps and books and the merchants of a city and its vicinity by which the merchants agreed not to use trading stamps issued by any other corporation or individual and not to sell the books or stamps to any one. *Merchants Legal Stamp Co. v. Murphy*, 281.

A corporation, which has issued trading stamps under contracts containing restrictions illegal and void under St. 1908, c. 454, § 1, cannot maintain a suit in equity to restrain a person, who with knowledge of the terms of such contracts bought the plaintiff's trading stamps from customers of the plaintiff, from buying and disposing of such stamps, where the defendant is not shown to have engaged in any fraud, deception or unfair competition. *Merchants Legal Stamp Co. v. Scott*, 389.

Whether such corporation can be compelled to redeem such trading stamps that have been acquired in violation of the unenforceable terms of its contracts, here was referred to as a question that was not before the court. *Ibid.*

MORTGAGE.

Of Real Estate.

A power to sell real estate given to the trustees under a will for the purpose of making a division of the property of the testator does not include a power to mortgage the real estate. *Sanger v. Farnham*, 34.

Where the nominal holder of the record title to certain real estate subject to a first mortgage for \$7,000 and to a second mortgage for \$5,000 which is held by the beneficial owner, at the request of the beneficial owner signs and delivers to a bank a note for \$2,000 and the beneficial owner thereupon delivers to the bank his second mortgage as collateral security for that note, the bank, in the absence of a special agreement to that effect, is under no obligation to redeem and pay the first mortgage when it becomes due in order to protect the second mortgage which it holds as collateral. *Carter v. Exchange Trust Co.* 543.

MOUNT EVERETT STATE RESERVATION.

At the trial of a petition for the assessment of damages for land taken under St. 1908, c. 571, for the Mount Everett State Reservation, where the value of the land was chiefly sentimental "as a sight seeing place," it was held to be within the discretionary power of the presiding judge to exclude evidence of the value of a parcel of land on the other side of the mountain without value as a mere sight seeing place but with value because of its wood and timber and because of its connection with other properties. *Macnaughtan v. Commonwealth*, 550.

At the same trial it was within the discretionary power of the presiding judge to exclude evidence of the price paid for the land taken under an option, which was procured, by one who afterwards became a member of the commission in charge of the reservation and conveyed the land to the Commonwealth, for the purpose of showing to the Legislature the price for which the land could be bought. *Ibid.*

MUNICIPAL CORPORATIONS.

Officers and Agents.

The board of appeal of the building department of the city of Boston are not judicial officers. *Murphy v. Mayor of Boston*, 73.

Extent of the power of the mayor of Boston under St. 1909, c. 486, § 14, to remove "any head of a department or member of a board (other than the election commissioners . . .)." *Ibid.*

Constitutionality of St. 1914, c. 630, directing the redistricting of Boston into wards and proper exercise by the council of the powers thus given to them. *Fitzgerald v. Mayor of Boston*, 503.

Action of the mayor and aldermen of a city in issuing a permit for the transportation of spirituous and intoxicating liquors into or in such city, if such permit is in proper form, cannot be reviewed in quo warranto proceedings brought by the Attorney General against the person, firm or corporation who received the permit, although such person, firm or corporation is not "regularly and lawfully conducting a general express business" according to the requirement of St. 1906, c. 421, § 2; St. 1911, c. 423. *Attorney General v. Lyons*, 536.

Whether under any circumstances such action of the mayor and board of aldermen could be reviewed in appropriate and seasonable proceedings, or whether the action is a practical detail in the administration of local affairs which, so long as honestly exercised, is vested finally in the mayor and board of aldermen, was not decided. *Ibid.*

Fire Department.

The "fire alarm operating branch" of the Boston fire department are entitled to membership in the corporation, Boston Firemen's Relief Fund. *Fickett v. Boston Firemen's Relief Fund*, 319.

Division of City into Wards.

Constitutionality of St. 1914, c. 630, directing the redistricting of Boston into wards and proper exercise by the council of the powers thus given to them. *Fitzgerald v. Mayor of Boston*, 503.

Unlawful Entry for Construction of Waterworks.

If a city unlawfully enters upon land and constructs a water conduit beneath the surface, the conduit becomes a part of the real estate and the property of the owner of the land. *Perley v. Cambridge*, 507.

Effect, at the trial of a petition against a city for the assessment by a jury of damages sustained by the taking of an easement in land of the petitioner for the construction and maintenance of a water conduit, of the fact that, previous to the taking, the city as a trespasser had entered upon the petitioner's land and had constructed the conduit. *Ibid.*

MUNICIPAL COURT OF THE CITY OF BOSTON.

Report to Appellate Division.

A request under St. 1912, c. 649, § 8, for a report of a ruling of a judge of the Municipal Court of the City of Boston for determination by the Appellate Division is not "filed with the clerk within two days after notice of the ruling," as required by the statute, if it is filed on the third day after the day on which the clerk of the court delivered such notice to the attorney for the requesting party. *Cobb v. Chickatawbut Club*, 146.

Under the rule adopted by the judges of the Municipal Court of the City of Boston relating to the procedure in requesting a report of a ruling for determination by the Appellate Division under St. 1912, c. 649, § 8, the right to a report to the Appellate Division is lost if the draft report was not filed within three days from that date. *Ibid.*

Correction of Record on Appeal.

Where, on an appeal from a decision of the Appellate Division of the Municipal Court of the City of Boston dismissing a report of a ruling of a single judge of that court, it does not appear by the record whether all the material evidence upon which the findings of the single judge were based is stated or described, this court will grant a motion that the appeal be dismissed to enable the party who requested the report to move for its correction by adding thereto the statement that it contains all the material evidence. *Burbank v. Farnham*, 514.

When such an appeal is dismissed for such a correction of the record, the case goes back to the Appellate Division, who will remand it to the single judge for amendment of his report; and, if the report is amended by him by the addition of the required statement, it should be presented to the Appellate Division, who will make a decision upon the report in its amended form, from which an appeal should be taken to this court. *Ibid.*

NAME.

In the provision of R. L. c. 72, § 5, in regard to the use in business of the name of a person by "a person who carries on business in this Commonwealth," the word "person" in the phrase quoted includes a corporation, although § 5 is not named in the sections enumerated in § 1 of the same chapter in which the word "person" includes "corporation." *C. H. Batchelder & Co. Inc. v. Batchelder*, 42.

Right of an awning maker, who had formed a corporation, with a name which consisted of his own name with the word "Company" added, to which he had transferred his business including the good will, to resume business under his own name after the corporation had passed into the hands of a receiver and to compel a new corporation, which had been formed by purchasers from the receiver of the former corporation's assets, including its "business, good will and trade names," to refrain from the use of his name. *Ibid.*

NEGLIGENCE.

General Rule.

It was held that there was no error in an instruction of the jury by the presiding judge at the trial of an action for personal injuries in relation to the defendant's duty in the maintenance and operation of an elevator, that, "due care to be exercised by anybody must be commensurate care. It must be the care which is equal and proportionate to the probable harmful consequences that may follow from the lack of its exercise." *Ogden v. Aspinwall*, 100.

Due Care of Plaintiff.

Of one driving a covered milk wagon upon a street containing street railway tracks from a street where his view of the tracks was somewhat obstructed. *Manley v. Bay State Street Railway*, 124.

Lack of due care of a laborer in a trench in a street who did not look up when he heard the noise of an approaching street car. *Dwyer v. Boston Elevated Railway*, 193.

Lack of due care of a workman attempting to load a manhole cover upon a wagon without help and with insufficient appliances. *Rogers v. F. A. Snow Co.* 212.

Of a person on a sidewalk in front of theatre struck by a falling staging. *Regan v. Keighley Metal Ceiling & Roofing Co.* 261.

Of a woman while boarding a street railway car before it went around a corner preparatory to starting on its return trip. *Wheeler v. Boston Elevated Railway*, 298.

Of a locomotive engineer who used a plank walk over a bridge in a railroad yard in leaving his work. *Letchworth v. Boston & Maine Railroad*, 560.

Of a woman who, when she saw a portion of a floor to which her husband had applied a walnut oil stain from a can of that substance suddenly burst into flame, seized the can and tried to extinguish the fire. *Thornhill v. Carpenter-Morton Co.* 593.

Due Care of Plaintiff's Decedent.

Of a trainman killed in a freight yard. *Robichaud v. New York, New Haven, & Hartford Railroad*, 250.

In an action for causing the death of a back boy in a mill due to a counterweight of an elevator falling upon his head, it was held that at a retrial after a rescript sustaining an exception to a refusal of the judge at the first trial to order a verdict for the defendant, the evidence did not materially differ and the verdict should be ordered for the defendant because the question, whether the boy was in the exercise of due care, was left a matter of conjecture. *Taylor v. Pierce Brothers, Ltd.* 254.

Assumption of Risk.

Employee of a subcontractor assisting in putting "finishing touches" on a building after a lessee has taken possession does not assume as matter of

law the risk of being crushed by reason of the negligence of an elevator boy of the lessee who is operating an elevator above a part of the elevator well where such employee of the subcontractor is working. *Gardner v. Copley-Plaza Operating Co.* 372.

A wool dealer by storing wool for a number of years in the sheds of a warehouseman on the water front of Boston, without objecting to the level of the floors of the sheds, does not assume the risk of damage to the wool from an unusually high tide, damage from which could be avoided by raising the floor level of the sheds or making them to some degree waterproof. *Hecht v. Boston Wharf Co.* 397.

In an action of tort for personal injuries, it cannot be ruled as a matter of law that the plaintiff assumed the risk of the injury, if there is evidence upon which a finding would be warranted that the plaintiff was ignorant of the existence of the risk. *Letchworth v. Boston & Maine Railroad*, 560.

In an action of tort for personal injuries the defendant, in order to rely on the defence that the plaintiff assumed the risk of the injury, must set it up affirmatively in his answer. *Ibid.*

Invited Person.

A man, who went to a mill to apply for work and by invitation entered the weave room of the mill and started to leave the room by a door which opened upon a staircase leading to a different side of the mill and fell down a flight of stairs and was injured, was held not to have been invited to leave the weave room by a different door from that by which he had entered it, so that; when injured, he was a mere licensee to whom the defendant owed no duty to keep its premises safe or to warn him of their condition. *Graham v. Pocasset Manuf. Co.* 195.

In an action by a woman against the person in control of a building and of its common stairways for personal injuries caused by a defect in a back stairway which the plaintiff was descending, after having made some purchases at a meat market of a tenant on the street floor of the building, it was held that there was evidence warranting findings that the plaintiff had the rights of one who was using the stairway by invitation. *Fitzsimmons v. Hale*, 461.

Evidence, at the trial of an action against a railroad company by one of its locomotive engineers to recover for personal injuries received when the plaintiff, in walking to the defendant's passenger station from the engine house to take a train to his home at the close of his work and in crossing a drawbridge over a river in the defendant's yard, fell through the bridge because of the lack of a plank walk that ordinarily was there, was held to warrant a finding that he was using the walk by an implied invitation of the defendant. *Letchworth v. Boston & Maine Railroad*, 560.

Licensee.

A man, who went to a mill to apply for work and by invitation entered the weave room of the mill and started to leave the room by a door which opened upon a staircase leading to a different side of the mill and fell down a flight

Negligence (*continued*).

of stairs and was injured, was held not to have been invited to leave the weave room by a different door from that by which he had entered it, so that, when injured, he was a mere licensee to whom the defendant owed no duty to keep its premises safe or to warn him of their condition. *Graham v. Pocasset Manuf. Co.* 195.

Where the general contractor for the construction of a hotel and one of the subcontractors are putting on the finishing touches and the lessee of the hotel is at least in partial possession of it, being engaged in installing its furniture and supplies and getting it ready to open to the public, an employee of the subcontractor, who is working in the well of one of the elevators of the hotel engaged in making the hotel suitable for occupancy, is not a mere licensee of the lessee of the hotel but is rightfully at his post and the lessee owes him the duty not to injure him negligently. *Gardner v. Copley-Plaza Operating Co.* 372.

Employer's Liability.

In an action against a street railway company for causing the death of a conductor in its employ who was crushed between his own car and another car of the defendant that started up behind him, it was held that, assuming in favor of the plaintiff that the jury could find that the car started automatically and that it might be inferred therefrom that the air brake was in a defective condition when the intestate was injured, there was no evidence that the defendant knew or ought to have known of such defective condition before the accident occurred. *Sheehan v. Boston Elevated Railway*, 210.

In an action against a railroad corporation for causing the death of a trainman in a freight yard of the defendant who was found dead beneath a freight car which by the impact of some shunted cars had been pushed about five feet a short time before, it was held that a verdict must be ordered for the defendant, because it was a matter of conjecture whether the intestate at the time he was killed was engaged in the performance of his duties and was in the exercise of due care. *Robichaud v. New York, New Haven, & Hartford Railroad*, 250.

Action for injuries caused to an engineer leaving his work on foot by a defect in a plank walk over a drawbridge in a railroad yard. *Leitchworth v. Boston & Maine Railroad*, 560.

Employee of an expressman or teamster, who, after waiting ten minutes for help, undertook unaided to load upon his wagon a heavy manhole cover using one wooden horse instead of the two, which he previously had used, and who was injured by the cover falling on his foot, was held to have been injured through his own fault so that he had no cause of action against his employer. *Rogers v. F. A. Snow Co.* 212.

In an action for causing the death of a back boy in a mill due to a counterweight of an elevator falling upon his head, it was held that at a retrial after a rescript sustaining an exception to a refusal of the judge at the first trial to order a verdict for the defendant, the evidence did not materially differ and the verdict should be ordered for the defendant because the question, whether the boy was in the exercise of due care, was left a matter of conjecture. *Taylor v. Pierce Brothers, Ltd.* 254.

Street Railway.

Automatic starting of car.

It has been settled by previous decisions of this court that the mere unexplained starting of an electric street railway car is not in itself evidence of negligence on the part of the corporation operating the railway. *Sheehan v. Boston Elevated Railway*, 210.

Passengers.

In an action by a woman against a street railway corporation for personal injuries sustained when the plaintiff was a passenger in a car of the defendant in a subway, approaching a station, certain testimony of the plaintiff and evidence as to the movements of the car were held not to be sufficient evidence of the negligence of the motorman to require the submission of the case to the jury. *Anderson v. Boston Elevated Railway*, 28.

Evidence, from which it can be inferred that the wooden pole supporting the hanging straps on one side of a street railway car having longitudinal seats broke under the strain put upon it by the sudden stopping of the car with a severe jerk when the car was crowded with passengers, so that either the pole or a man whose weight was supported by one of the straps fell on a woman passenger and injured her, warrants a finding that the pole was in a defective condition that rendered it unsafe for the purpose for which it was used and that the corporation operating the railway should have discovered and remedied this condition before subjecting the pole to so sudden and severe a strain. *Davies v. Boston Elevated Railway*, 200.

The questions, whether a woman who, while an open electric street railway car was stationary at the last regular stopping place at one end of its route and was about to go round a curve before returning in the opposite direction on the other parallel track, without any objection from the conductor gets on the running board for the purpose of taking the car on the return trip, and walks along it preparatory to taking a seat by the side of a companion who got on the car at the same time, was a passenger and was in the exercise of due care, were held to be for the jury. *Wheeler v. Boston Elevated Railway*, 298.

It also was held that the question, whether the conductor of the car was negligent in giving a signal for starting the car before such woman reached a place of safety, was for the jury. *Ibid.*

Where a passenger in a street railway car was injured by glass that fell from one of the car windows that was broken with a "crash" when a coal wagon came in collision with the side of the car and there is nothing to show who, if anybody, was negligent or at fault, the injured passenger has no remedy against the railway company operating the car. *Stangy v. Boston Elevated Railway*, 414.

Where it appears that a passenger in a street railway car was injured by reason of a collision of a coal wagon with the side of the car, there can be no resort to the doctrine of *res ipsa loquitur*, under which the happening of an unexplained accident on a street railway car may raise a presumption of fact of negligence on the part of the corporation operating the car. *Ibid.*

It was held that at the trial of an action by a woman passenger upon an electric street railway car against the street railway company for personal injuries received in a collision of cars, the evidence of the effect of the impact of the

Negligence (continued).

cars, together with the testimony of the plaintiff's physician, tended to show that the plaintiff at the time of the collision suffered a physical injury from without, so that a finding for the plaintiff was warranted. *Megathlin v. Boston Elevated Railway*, 558.

Persons on highway.

In an action against a street railway company by a milk dealer who received personal injuries when a wagon in which he was travelling was struck by an electric street car operated by the defendant upon a single track railway when the wagon was driven into the street containing the track from a street where his view of the track was partly obstructed, it was held that the questions, whether the plaintiff was in the exercise of due care and whether the motorman was negligent, were for the jury. *Manley v. Bay State Street Railway*, 124.

At the trial of such an action a request for a ruling, that, "To look when looking is of no avail and to listen for nothing in particular is equivalent to not looking or listening at all, and if this is all that the plaintiff's driver did, the plaintiff is not entitled to damages and your verdict must be for the defendant," properly may be refused. *Ibid.*

A laborer in the employ of a gas company, who was working in a trench between two parallel tracks of a street railway and was struck by a car coming from the direction in which he was facing, which he did not see because he failed to look up from his work when he heard the noise of its approach, was held as a matter of law not to have been in the exercise of due care. *Dwyer v. Boston Elevated Railway*, 193.

In an action against a street railway company for causing the death of a conductor in its employ who was crushed between his own car and another car of the defendant that started up behind him, it was held that, assuming in favor of the plaintiff that the jury could find that the car started automatically and that it might be inferred therefrom that the air brake was in a defective condition when the intestate was injured, there was no evidence that the defendant knew or ought to have known of such defective condition before the accident occurred. *Sheehan v. Boston Elevated Railway*, 210.

Railroad.

In an action against a railroad corporation for causing the death of a trainman in a freight yard of the defendant who was found dead beneath a freight car which by the impact of some shunted cars had been pushed about five feet a short time before, it was held that a verdict must be ordered for the defendant, because it was a matter of conjecture whether the intestate at the time he was killed was engaged in the performance of his duties and was in the exercise of due care. *Robichaud v. New York, New Haven, & Hartford Railroad*, 250.

Action for injuries caused by a defective plank walk over a drawbridge in a railroad yard. *Letchworth v. Boston & Maine Railroad*, 560.

In Use of Highway.

In an action against a street railway company by a milk dealer who received personal injuries when a wagon in which he was travelling was struck by an electric street car operated by the defendant upon a single track railway

when the wagon was driven into the street containing the tracks from a street where his view of the track was partly obstructed, it was held that the questions, whether the plaintiff was in the exercise of due care and whether the motorman was negligent, were for the jury. *Manley v. Bay State Street Railway*, 124.

In Use of Automobile.

At the trial together of two actions, one against a corporation which was a manufacturer of automobiles and the other against a corporation which was the proprietor of a department store to which the first corporation had sold automobile trucks agreeing to furnish with each truck without cost for seven days a chauffeur who would instruct the store corporation's men and to "garage" the trucks for twelve months, for personal injuries caused to a traveller on the highway, it was held that a verdict should be ordered for the store corporation because there was no evidence that the driver was its employee; and that a verdict for the plaintiff was warranted in the action against the automobile corporation. *Tornroos v. R. H. White Co.* 336.

In Use of Team.

If, at the trial of an action for personal injuries, there is evidence that the defendant, while trying to back a horse attached to a wagon, asked the plaintiff to help him, that the plaintiff in response to such request took hold of the spokes of the rear wheel and helped to move the wagon back, and that the defendant, although he saw the position of the plaintiff's hands, without warning to the plaintiff then caused the horse to move forward, reversing the wheel and crushing one of the plaintiff's hands, the jury are warranted in finding that the plaintiff was in the exercise of due care and that the defendant was negligent. *Stevens v. Reyn*, 332.

In Use of Gasoline.

Where an employee of the occupant of a garage was killed by an explosion caused by the ignition, when he opened a furnace door, of vapors of gasoline which an oil company's servant negligently had swept into a pit six weeks before and which was caused to flow from the pit when water was poured into the pit by the occupant of the garage who knew of the gasoline's presence, it was held that an action might be maintained against the oil company for the conscious suffering and death of such employee. *Leahy v. Standard Oil Co. of New York*, 90.

Where at the trial of such action the judge refuses to rule that, if the negligence of the defendant's employee and of the employer of the plaintiff's intestate were contributory proximate causes of the accident, the plaintiff is entitled to a verdict, and instead leaves it to the jury to determine which of the two was the cause of the accident, exceptions to such rulings must be sustained. *Ibid.*

At the trial of an action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, by the administrator of one whose death was alleged to have been caused by negligence of an employee of the defendant in sweeping gasoline into a pit in a cellar, evidence is admissible, as bearing on the degree of culpability of the defendant's employee, to show that the employee stub-

Negligence (continued).

bornly persisted in so disposing of the gasoline although persons standing by at the time told him that he should not so do and suggested to him a proper way in which to dispose of it. *Leahy v. Standard Oil Co. of New York*, 90.

Staging over Highway in Front of Theatre.

In an action against the proprietor of a theatre for personal injuries caused by the fall of a staging erected by a painter and his servants over the sidewalk in front of the theatre, it was held that the defendant was not liable because the painter was an independent contractor and had no control of the servants of the painter. *Regan v. Superb Theatre, Inc.* 259.

But the painter was held, on the evidence, to be liable. *Regan v. Keighley Metal Ceiling & Roofing Co.* 261.

Of One owning or controlling Real Estate.

In maintenance of defective elevator. *Shea v. McEvoy*, 239.

In maintenance of defective common stairway. *Flanagan v. Welch*, 186.

In an action against the owner of a building for personal injuries from a passenger elevator suddenly starting downward as the plaintiff, who had rights of a tenant, was stepping out of it at a floor where it had stopped, evidence tending to show that the metal grill work in the front of the car was removable and that the bolts which fastened it to the car were defective, which the defendant knew, so that the grill work fell in on the elevator boy, causing him involuntarily to pull the lever and start the elevator downward, was held to warrant a finding that the defendant was negligent. *Ogden v. Aspinwall*, 100.

In an action by a woman against the person in control of a building and of its common stairways for personal injuries caused by a defect in a back stairway which the plaintiff was descending, after having made some purchases at a meat market of a tenant on the street floor of the building, it was held that there was evidence warranting findings that the plaintiff was using the stairway by invitation and that the defendant could be held liable to the plaintiff for any neglect of proper precautions to keep the stairway in as good condition as it was or had appeared to be at the time of the letting. *Fitzsimmons v. Hale*, 461.

Of Bailees for Hire; Warehouseman.

In an action by a woman for the loss of a fur coat which she had delivered to the defendant as a bailee for hire to keep for her in cold storage, certain excuses and conduct of the defendant's employees were held to constitute evidence of the defendant's negligence, on which the plaintiff, who had not agreed to any valuation of her fur coat, could recover the full value of the coat from the defendant if she obtained a verdict. *Cohen v. Henry Siegel Co.* 215.

In an action by the owner of certain wool for its damage by salt water in 1909 when stored in the warehouse of the defendant on the water front of Boston at the time of the highest tide that had risen in Boston for nearly sixty years, it was held that there was evidence for the jury of negligence on the part of the defendant in the performance of its contract as warehousemen or bailee of the wool. *Hecht v. Boston Wharf Co.* 397.

In Department Store.

It was held that the proprietor of a department store could not be found under the circumstances to have been negligent toward his customers in maintaining at the entrance to the store for the use of persons entering and leaving it a certain revolving door, nor in not providing an attendant at the door to protect persons from being injured by the rapidity of its revolutions. *Buzzell v. R. H. White Co.* 129.

In Use or Maintenance of Elevator.

In an action against the owner of a building for personal injuries from a passenger elevator suddenly starting downward as the plaintiff, who had rights of a tenant, was stepping out of it at a floor where it had stopped, evidence tending to show that the metal grill work in the front of the car was removable, and that the bolts which fastened it to the car were defective, which the defendant knew, so that the grill work fell in on the elevator boy, causing him involuntarily to pull the lever and start the elevator downward, was held to warrant a finding that the defendant was negligent. *Ogden v. Aspinwall*, 100.

Evidence at the trial of an action against the owner of a three tenement house for causing the death of a child of a tenant who was struck by a small elevator while in a common passageway, was held to warrant a verdict for the plaintiff because the jury were warranted in finding that the elevator and its appliances were defective at the time of the accident, that they gradually had become so during the fifteen years of their non-repair, and that they were not in as good condition as they had appeared to be when the tenancy of the intestate's father had begun. *Shea v. McEvoy*, 239.

In an action against the lessee of a hotel for injuries sustained by an employee of a subcontractor, when the defendant had taken at least partial possession of the hotel under his lease and was getting it ready to open to the public and the general contractor was putting on the finishing touches, from the negligent operation of an elevator which descended on the plaintiff as he was working in the elevator well underneath it, it was held that the question whether the negligent elevator boy at the time of the accident was in the employ of the defendant, was for the jury. *Gardner v. Copley-Plaza Operating Co.* 372.

In Maintenance of Common Stairway.

Evidence, in an action by a tenant against a landlord, for personal injuries resulting from a defective condition of a stairway used in common by the landlord and his tenants, was held to warrant submission of the case to the jury. *Flanagan v. Welch*, 186.

Rules of law determining liability in such case. *Ibid.*

In Building in Process of Construction.

Action against the lessee of a hotel for injuries sustained by an employee of a subcontractor, when the defendant had taken at least partial possession of the hotel under his lease and was getting it ready to open to the public

Negligence (*continued*).

and the general contractor was putting on the finishing touches, from the negligent operation of an elevator which descended on the plaintiff as he was working in the elevator well underneath it. *Gardner v. Copley-Plaza Operating Co.* 372.

Such employee of the subcontractor does not assume as matter of law the risk of being crushed by reason of the negligence of an elevator boy of the lessee who is operating an elevator above the part of the elevator well where such employee of the subcontractor is working. *Ibid.*

Such employee of the subcontractor is not a mere licensee of the lessee of the hotel but is rightfully at his post and the lessee owes him the duty not to injure him negligently. *Ibid.*

In Maintenance of Revolving Door.

It was held that the proprietor of a department store could not be found under the circumstances to have been negligent toward his customers in maintaining at the entrance to the store for the use of persons entering and leaving it a certain revolving door, nor in not providing an attendant at the door to protect persons from being injured by the rapidity of its revolutions. *Buzzell v. R. H. White Co.* 129.

In a Mill.

A man, who went to a mill to apply for work and by invitation entered the weave room of the mill and started to leave the room by a door which opened upon a staircase leading to a different side of the mill and fell down a flight of stairs and was injured, was held not to have been invited to leave the weave room by a different door from that by which he had entered it, so that, when injured, he was a mere licensee to whom the defendant owed no duty to keep its premises safe or to warn him of their condition. *Graham v. Pocasset Manuf. Co.* 195.

In an action for causing the death of a back boy in a mill due to a counterweight of an elevator falling upon his head, it was held that at a retrial after a rescript sustaining an exception to a refusal of the judge at the first trial to order a verdict for the defendant, the evidence did not materially differ. *Taylor v. Pierce Brothers, Ltd.* 254.

In Railroad Yard.

In an action against a railroad corporation for causing the death of a trainman in a freight yard of the defendant who was found dead beneath a freight car which by the impact of some shunted cars had been pushed about five feet a short time before, it was held that a verdict must be ordered for the defendant, because it was a matter of conjecture whether the intestate at the time he was killed was engaged in the performance of his duties and was in the exercise of due care. *Robichaud v. New York, New Haven, & Hartford Railroad*, 250.

Evidence at the trial of an action against a railroad company by one of its locomotive engineers to recover for personal injuries received when the plaintiff, in walking to the defendant's passenger station from the engine house to take a train to his home at the close of his work and in crossing a

drawbridge over a river in the defendant's yard, fell through the bridge because of the lack of a plank walk that ordinarily was there, was held to warrant a finding that he was using the walk by an implied invitation of the defendant. *Letchworth v. Boston & Maine Railroad*, 560.

In such action, evidence tending to show that the defendant in repairing the bridge had taken up the walk and had not replaced it and had given no warning of its absence by signal, notice or otherwise, warrants a finding of negligence on the part of the defendant whether or not it is found that, when injured, the plaintiff was acting within the scope of his employment. *Ibid.* And where it further appeared that to get to the station by the only other route would have resulted in the loss of over an hour's time for the plaintiff, that in approaching the bridge he was looking at the signals in the yard to avoid being run into by trains, and that he had no cause to know that the planking of the walk on the bridge was up, a finding that the plaintiff was in the exercise of due care was warranted. *Ibid.*

Of Attorney at Law.

Action against an attorney at law for damages alleged to have resulted from his negligence either in failing to give the proper statutory notice to his client's employer or, if it was given, in failing to preserve and perpetuate evidence of its having been given. *McLellan v. Fuller*, 494.

An error, at the trial of an action against an attorney at law for alleged negligence in conducting an action by the plaintiff against the plaintiff's employer, in the exclusion of a deposition of a witness offered by the defendant is prejudicial if it appears that the testimony given by the witness in the deposition materially and substantially differs from that given by him at the trial of the previous action and, if believed, would show that in that action justice would have been done only if, irrespective of the way in which the attorney conducted the plaintiff's case, a verdict had been found for the plaintiff's employer, who was the defendant in that case. *Ibid.*

Of Dentist.

Evidence, at the trial of an action by a woman against a dentist for injuries alleged to have been caused by the plaintiff being infected with syphilis from dental instruments used by an employee of the defendant in treating her without the instruments having been sterilized properly before such use, was held to warrant a verdict for the plaintiff. *Drakes v. Tilloch*, 256.

Of Painter.

If a painter erects over a sidewalk in front of a theatre a temporary staging built of upright trestles with planks laid from one trestle to another and not fastened and, when the sidewalk is crowded, his workmen leave the staging unprotected and unguarded for ten or fifteen minutes during which a gust of wind blows it over and it strikes and injures a person entering the theatre, in an action against the painter for the injuries so received, the jury are warranted in finding that the plaintiff was in the exercise of due care and that the defendant was negligent. *Regan v. Keighley Metal Ceiling & Roofing Co.* 261.

Of One repairing Sewing Machine.

On the evidence at the trial of an action by a girl against a dealer in sewing machines for personal injuries sustained from being struck on the head and nose by the cover of a sewing machine hired by the plaintiff's mother from the defendant by reason of the negligent manner in which an agent of the defendant who had been sent to repair the machine raised its cover, it was held, that the questions of the plaintiff's due care and of the negligence of the defendant's agent were for the jury. *Doyle v. Singer Sewing Machine Co.* 327.

In compounding and selling Dangerous Substance.

On the evidence, it was held that a verdict for the plaintiff was warranted in an action against a manufacturer of and dealer in paints, oils, varnishes and oil stains by the wife of a purchaser of "walnut oil stain" for personal injuries caused by the ignition of the stain while the plaintiff's husband was painting a floor with it due to its being composed largely of volatile and inflammable ingredients. *Thornhill v. Carpenter-Morton Co.* 593.

In lifting Heavy Weight.

Employee of an expressman or teamster, who when, after waiting ten minutes for help, he undertook unaided to load upon his wagon a heavy manhole cover using one wooden horse instead of the two, which he previously had used, and who was injured by the cover falling on his foot, was held to have been injured through his own fault so that he had no cause of action against his employer. *Rogers v. F. A. Snow Co.* 212.

Independent Contractor.

In an action against the proprietor of a theatre for personal injuries caused by the fall of a staging over the sidewalk in front of the theatre, erected by a painter and his servants, it was held that the defendant was not liable because the painter was an independent contractor and had no control of the servants of the painter. *Regan v. Superb Theatre, Inc.* 259.

Causing Death.

Where an employee of the occupant of a garage was killed by an explosion caused by the ignition, when he opened a furnace door, of vapors of gasoline which an oil company's servant negligently had swept into a pit six weeks before and which was caused to flow from the pit when water was poured into the pit by the occupant of the garage who knew of the gasoline's presence, it was held that an action might be maintained against the oil company for the conscious suffering and death of such employee. *Leahy v. Standard Oil Co. of New York*, 90.

At the trial of an action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, by the administrator of one whose death was alleged to have been caused by negligence of an employee of the defendant in sweeping gasoline into a pit in a cellar, evidence is admissible, as bearing on the degree of culpability of the defendant's employee, to show that the employee stubbornly persisted in so disposing of the gasoline although persons standing by at the time

- told him that he should not do so and suggested to him a proper way in which to dispose of it. *Leahy v. Standard Oil Co. of New York*, 90.
- Where at the trial of such action the judge refuses to rule that, if the negligence of the defendant's employee and of the employer of the plaintiff's intestate were contributory proximate causes of the accident, the plaintiff is entitled to a verdict, and instead leaves it to the jury to determine which of the two was the cause of the accident, exceptions to such rulings must be sustained. *Ibid.*
- In an action against a street railway company for causing the death of a conductor in its employ who was crushed between his own car and another car of the defendant that started up behind him, it was held that, assuming in favor of the plaintiff that the jury could find that the car started automatically and that it might be inferred therefrom that the air brake was in a defective condition when the intestate was injured, there was no evidence that the defendant knew or ought to have known of such defective condition before the accident occurred. *Sheehan v. Boston Elevated Railway*, 210.
- Evidence at the trial of an action by an administrator for the conscious suffering and death of his intestate alleged to have been caused by negligence of the defendant, a manufacturing corporation, which was held to warrant a finding that his intestate when injured was in the employ of an electrical expert who was making tests for the defendant as an independent contractor. *Healey v. American Tool & Machine Co.* 236.
- Evidence at the trial of an action against the owner of a three tenement house for causing the death of a child of a tenant who was struck by a small elevator while in a common passageway, was held to warrant a verdict for the plaintiff because the jury were warranted in finding that the elevator and its appliances were defective at the time of the accident, that they gradually had become so during the fifteen years of their non-repair, and that they were not in as good condition as they had appeared to be when the tenancy of the intestate's father had begun. *Shea v. McEvoy*, 239.
- In an action against a railroad corporation for causing the death of a trainman in a freight yard of the defendant who was found dead beneath a freight car which by the impact of some shunted cars had been pushed about five feet a short time before, it was held that a verdict must be ordered for the defendant, because it was a matter of conjecture whether the intestate at the time he was killed was engaged in the performance of his duties and was in the exercise of due care. *Robichaud v. New York, New Haven, & Hartford Railroad*, 250.
- In an action for causing the death of a back boy in a mill due to a counterweight of an elevator falling upon his head, it was held that at a retrial after a rescript sustaining an exception to a refusal of the judge at the first trial to order a verdict for the defendant, the evidence did not materially differ. *Taylor v. Pierce Brothers, Ltd.* 254.

Disobedience of Rules.

- In an action against a railroad corporation for causing the death of a flagman in a freight yard of the defendant, it was held that the defendant had no right to rely, in support of the ordering of a verdict in its favor, on any evidence or inference as to the intestate's knowledge of rules of the defendant

Negligence (*continued*).

nor as to his disobedience of them. *Robichaud v. New York, New Haven, & Hartford Railroad*, 250.

Conduct in an Emergency.

If, when a woman sees the portion of a floor to which her husband has applied a walnut oil stain from a can of that substance suddenly burst into flame, she seizes the can and tries to extinguish the fire, this action taken in an emergency is not negligence as matter of law and does not deprive her of the right of going to the jury in an action brought by her against the dealer who put the explosive and inflammable substance on the market to recover for her injuries from the flames. *Thornhill v. Carpenter-Morton Co.* 593.

Probable Consequences.

In this Commonwealth it long has been settled law that in an action of tort for personal injuries it is not necessary, in order to hold the defendant liable, for the plaintiff to prove that the particular series of events that resulted in the plaintiff's injuries were the probable consequences of the defendant's negligence. *Ogden v. Aspinwall*, 100.

It is enough for the plaintiff in such an action to show that the probable consequence of the defendant's conduct was that harm of the same general character as that which came to the plaintiff would come to persons who stood in the same general relation to the defendant that the plaintiff did. *Ibid.*

Proximate Cause.

See that title.

Res ipsa loquitur.

Evidence, from which it can be inferred that the wooden pole supporting the hanging straps on one side of a street railway car having longitudinal seats broke under the strain put upon it by the sudden stopping of the car with a severe jerk when the car was crowded with passengers, so that either the pole or a man whose weight was supported by one of the straps fell on a woman passenger and injured her, warrants a finding that the pole was in a defective condition that rendered it unsafe for the purpose for which it was used and that the corporation operating the railway should have discovered and remedied this condition before subjecting the pole to so sudden and severe a strain. *Davies v. Boston Elevated Railway*, 200.

It has been settled by previous decisions of this court that the mere unexplained starting of an electric street railway car is not in itself evidence of negligence on the part of the corporation operating the railway. *Sheehan v. Boston Elevated Railway*, 210.

In an action against a street railway company for causing the death of a conductor in its employ who was crushed between his own car and another car of the defendant that started up behind him, it was held that, assuming in favor of the plaintiff that the jury could find that the car started automatically and that it might be inferred therefrom that the air brake was in a defective condition when the intestate was injured, there was no evidence that the defendant knew or ought to have known of such defective condition before the accident occurred. *Ibid.*

Where it appears that a passenger in a street railway car was injured by reason of a collision of a coal wagon with the side of the car, there can be no resort to the doctrine of *res ipsa loquitur*, under which the happening of an unexplained accident on a street railway car may raise a presumption of fact of negligence on the part of the corporation operating the car. *Stangy v. Boston Elevated Railway*, 414.

NEGOTIABLE INSTRUMENTS.

See **BILLS AND NOTES.**

NEW TRIAL.

See that subtitle under **PRACTICE, CIVIL.**

NOTICE.

Where a bank discounted a negotiable promissory note and afterwards it was discovered that before such discounting the cashier had materially altered the note for his own fraudulent purposes, but that no other officer or employee of the bank knew of the fraud, it was held that it could be found that the bank was a holder in due course, the knowledge of the cashier not having been constructive notice to the bank because the cashier was engaged in committing an independent fraudulent act on his own account. *Broadway National Bank of Chelsea v. Heffernan*, 247.

Rule 7, made by the bar examiners and approved by this court, provided that it should go into effect at a date three years after the date of its approval, and this was reasonable notice of the enforcement of the rule. *Bergeron, petitioner*, 472.

Deposition of a witness in an action at law, taken upon oral interrogatories on the ground that the witness was about to go out of the Commonwealth not to return in time for the trial, which under the circumstances was held not to be inadmissible in evidence merely by reason of the fact that the notice that it was to be taken, given by the justice of the peace before whom it was to be taken to the party objecting to its admission, misspelled that party's name. *McLellan v. Fuller*, 494.

Existence of blank places in certain negotiable instruments and assignments of insurance policies, which was held under the circumstances to put one, to whom the instruments and assignments and policies were delivered, upon inquiry as to the authority for filling in the blanks. *Munroe v. Stanley*, 438; *Stone v. Sargent*, 445.

NUISANCE.

A plea in bar to a complaint for keeping a common nuisance consisting of a tenement resorted to for prostitution during a period named, setting up under R. L. c. 205, § 6, an alleged acquittal upon the same charge, is not sustained by showing that a previous complaint upon a like charge covering a part of the same period was dismissed without a trial. *Commonwealth v. Anderson*, 142.

Proper instruction by the judge presiding at the trial of a complaint charging the defendant with keeping a common nuisance consisting of a tenement

Nuisance (*continued*).

resorted to for prostitution, as to evidence that certain police officers made statements to the defendant which if believed by the jury had a tendency to prove the offence charged and that the defendant denied these statements, and where it could be found that the defendant's denials were false and tended to show a consciousness of guilt. *Commonwealth v. Anderson*, 142.

ORDER.

The position on the paper of certain words written in an order for goods created an ambiguity which rendered oral evidence admissible to explain the meaning of the instrument. *Waldstein v. Dooskin*, 232.

PARENT AND CHILD.

Under R. L. c. 152, §§ 16, 17, 25-28, the Superior Court, when a man and his wife are before it as the parties to a libel for divorce, becomes the court of domestic relations in matters affecting the welfare of the family and the care, custody and support of minor children. *DeFerrari v. DeFerrari*, 38.

R. L. c. 152, § 17, gives the Superior Court full jurisdiction, where after the hearing of a libel for divorce the conclusion is reached that a divorce should not be granted but that there ought to be a temporary separation of the parties or a maintenance of the wife separate and apart from the husband, to deal with the case as the interests of the parties may require and to make orders for the separate maintenance of the wife and the custody and support of minor children, which while in force shall supersede any order or decree of the Probate Court under R. L. c. 153, § 33. *Ibid*.

A decree of the Probate Court appointing a man and his wife joint guardians of their minor child is superseded, so far as it relates to the custody of the child, by a decree of the Superior Court, made in a divorce suit brought by the wife more than a year later, awarding to the wife the care and custody of such minor child and ordering the husband to make certain payments for the support of his wife and child. *Ibid*.

Where a husband abandons his wife and she is compelled to support and care for a minor child of the husband and herself, she becomes entitled to collect such child's earnings, and, if he is injured through negligence of a third person, to maintain an action against such third person for the loss of the services of the child. *Tornroos v. R. H. White Co.* 336.

PARTNERSHIP.

A trustee in bankruptcy of the estate of a person, who was a member of a partnership until about two months before he was adjudicated a bankrupt, cannot maintain a suit in equity to recover the amount of an alleged unlawful preference where the transfer sought to be avoided was made by the partnership and not by the plaintiff's bankrupt individually. *Rubenstein v. Lottow*, 156.

PARTY WALL.

Construction of the covenants in and provisions of a lease to a banking corporation of a two story building on Devonshire Street in Boston upon which it was held, as to a party wall which formed part of the building and

of a building on an adjacent lot and was six stories in height, that all the lessor's interest in the party wall was conveyed to the lessee for the term of the lease, and that the lessor had no right to compel either the lessee or the owner of the adjoining building to close openings for windows placed with the lessee's permission in the wall above the line of the roof of the bank building. *Torrey v. Parker*, 520.

Conduct of such lessee because of which, it was held, he was not estopped to deny the lessor's right of control over that part of the party wall above the roof line of the banking building. *Ibid*.

It also was held that the circumstances furnished no basis for a contention that there was a relation of principal and agent between the lessee and lessor. *Ibid*.

Under the circumstances the giving by such lessee to the owner of the adjoining building of permission to use the party wall above the roof line of the banking building for the purpose of placing the windows there for the adjoining building is not a violation of the promise of the lessee that the demised premises shall be used "only as a banking house," such use of the wall being incidental and subsidiary to and not inconsistent with the exclusive use of the premises for a banking house. *Ibid*.

In a suit in equity by the owner of land with a two story building thereon and with a party wall standing upon it and adjoining land extending several stories above that building, against the lessee of the two story building and the owner of the adjoining building to enforce an alleged right to have openings, which had been made in the wall for windows, closed, it is a proper subject for a cross bill by the owner of the adjoining building against the plaintiff and one to whom he had conveyed his right in the party wall to seek to compel the removal of shutters placed by them over the openings in the wall. *Ibid*.

PASSENGER.

Question, whether a woman who, without objection by the conductor, boarded the running board of a street car while it stood still at its last regular stopping place at the end of its route before it went around a curve to prepare to take passengers for its return trip, was under the circumstances a passenger on the car, was held to be for the jury. *Wheeler v. Boston Elevated Railway*, 298.

Actions for personal injuries to passengers in street railways, see NEGLIGENCE, *Street Railway*, Passengers.

PATH.

Petition for the assessment of damages due to the taking of one half of a private path in Brookline for a public way. *Newburyport Institution for Savings v. Brookline*, 300.

PAYMENT.

Payment by a guarantor of a balance alleged to be due in an erroneous statement rendered by the creditor to the principal debtor was held under the circumstances to have effected neither a release nor a discharge of the principal debt nor any accord and satisfaction, and it was held that the

Payment (continued).

principal debt and the guaranty remained in force. *Barber Asphalt Paving Co. v. Mullen*, 308.

PHOTOGRAPHS.

See *EVIDENCE, Photograph, X-ray Photographic Plates.*

PLAN.

A blank space left in one corner of a large plan, upon which streets were designated and blocks of building lots were marked out, was held not necessarily to show an intention, in a deed conveying the house lots on the line of the extension of a street opposite the open space, which was made by a grantor who also owned the open space and referred to the plan, that this land should be left open or should be added to the width of the street. *Hobart v. Towle*, 293.

It accordingly was held that it properly could be found that by the reference to the plan in the deed no easement in the strip was created by grant or implication for the benefit of the lots of land on the opposite side of the extension of the street fifty feet wide. *Ibid.*

PLEADING, CIVIL.

Specifications.

The ordering of particulars and specifications as to allegations in pleadings rests in the judicial discretion of the trial court and is not subject to review by this court unless there appears to have been an abuse of discretion. *Nickerson v. Glines*, 333.

A finding of fact by a judge as a basis of an order that the plaintiff shall file specifications as to certain allegations in his declaration cannot be reviewed on exceptions where it appears that the finding was made in part in reliance upon statements of counsel which are not reported. *Ibid.*

Action of a judge of the Superior Court in ordering a plaintiff nonsuited because he refused to obey an order directing him to file specifications was held to have been a proper exercise of discretion. *Ibid.*

The proper way to bring before this court the question, whether an order of a judge of the Superior Court nonsuiting a plaintiff for failure to obey a previous order directing him to file specifications to allegations in his declaration, was an abuse of judicial discretion, is by a bill of exceptions and not by an appeal. *Ibid.*

Demurrer.

An appeal of a defendant from an order overruling his demurrer to certain counts of a declaration, to which other counts afterwards were added by amendment, is disposed of by an order of the judge presiding at the trial of the case, directing the jury to return a verdict for the defendant on the counts demurred to, thus making the demurrer immaterial. *Thornhill v. Carpenter-Morton Co.* 593.

Answer.

A discharge in bankruptcy cannot be taken advantage of as a defence to an action of contract unless it is pleaded. *Herschman v. Justices of the Municipal Court of the City of Boston*, 137.

Circumstances which were held not to relieve a bankrupt from an arrest upon an execution issuing on a judgment which resulted from a failure to set up

the defence of his discharge in bankruptcy. *Herschman v. Justices of the Municipal Court of the City of Boston*, 137.

Whether the bankrupt had any remedy either by a petition for a writ of review or by a suit in equity was not determined. *Ibid*.

In an action of tort for personal injuries the defendant, in order to rely on the defence that the plaintiff assumed the risk of the injury, must set it up affirmatively in his answer. *Letchworth v. Boston & Maine Railroad*, 560.

Variance.

There was held to be no variance between the allegations in the declaration in an action of tort by a woman against a dentist and the evidence at the trial. *Drakes v. Tulloch*, 256.

PLEADING, CRIMINAL.

Plea in Bar.

Plea in bar of *autrefois acquit*, see *AUTREFOIS ACQUIT*.

PLEDGE.

Where a contract is made for the sale of certain shares of stock with the agreement that, if at any time the buyer wishes to return the shares, the seller will buy them back from him at the same price, a pledge of the shares by the buyer to the seller to secure a loan of money to the buyer is not an election by the buyer to keep the shares and not to insist on the seller's promise to buy them back. *Armstrong v. Orler*, 112.

Effect of certain fraudulent acts of a general agent of a life insurance company in alteration of notes and in exceeding the authority conferred upon him by persons who placed incomplete notes and assignments of life insurance policies in his possession in pledge or for use in making pledges. *Tower v. Stanley*, 429; *Munroe v. Stanley*, 438; *Stone v. Sargent*, 445.

Where the nominal holder of the record title to certain real estate subject to a first mortgage for \$7,500 and to a second mortgage for \$5,000 which is held by the beneficial owner, at the request of the beneficial owner signs and delivers to a bank a note for \$2,000 and the beneficial owner thereupon delivers to the bank his second mortgage as collateral security for that note, the bank, in the absence of a special agreement to that effect, is under no obligation to redeem and pay the first mortgage when it becomes due in order to protect the second mortgage which it holds as collateral. *Carter v. Exchange Trust Co.* 543.

It also was held that, after judgment on the note above described, the judgment debtor and the beneficial owner of the land, whose remedy at law is adequate, cannot maintain a suit in equity against the judgment creditor to have set off against the judgment a sum of money received by the judgment creditor from the first mortgagee as surplus proceeds from a foreclosure of the first mortgage by sale. *Ibid*.

POLICE.

Under St. 1911, c. 624, the Police Court of Somerville has jurisdiction to hear and determine a petition by a captain in the police department of that city

Police (*continued*).

for a review of the action of the mayor and aldermen in retiring him from active service and placing him on the pension roll at half pay under St. 1903, c. 428, as amended by St. 1909, c. 188. *Mayor of Somerville v. Justices of the Police Court of Somerville*, 393.

A certain letter, written and signed by the director of public safety of the city of Lawrence and addressed to and served upon a sergeant of the police of that city under authority of the provision of the city charter contained in St. 1911, c. 621, Part II, § 43, it was held, fairly might be construed to mean that the writer had decided on the day of its date to reduce the rank of the officer and that the decision would take effect two days later. *O'Brien v. Cadoogan*, 578.

If such sergeant of police of the city of Lawrence was entitled to a notice under the provisions of the civil service law contained in Sts. 1904, c. 314, § 2; 1906, c. 210, it was held that a notice of two days was a reasonable one which could be found to have afforded him ample time to ask for a public hearing. *Ibid*.

POLICE, DISTRICT AND MUNICIPAL COURTS.

Under St. 1911, c. 624, the Police Court of Somerville has jurisdiction to hear and determine a petition by a captain in the police department of that city for a review of the action of the mayor and aldermen in retiring him from active service and placing him on the pension roll at half pay under St. 1903, c. 428, as amended by St. 1909, c. 188. *Mayor of Somerville v. Justices of the Police Court of Somerville*, 393.

MUNICIPAL COURT OF THE CITY OF BOSTON, see that title.

PRACTICE, CIVIL.

Amendment.

Statement by Rugg, C. J., of the practice of this court in regard to the discharge of exceptions, reports, reservations or appeals from the Superior Court or the Supreme Judicial Court for the purpose of correcting the record by amendment. *Burbank v. Farnham*, 514.

Where, on an appeal from a decision of the Appellate Division of the Municipal Court of the City of Boston dismissing a report of a ruling of a single judge of that court, it does not appear by the record whether all the material evidence upon which the findings of the single judge were based is stated or described, this court will grant a motion that the appeal be dismissed to enable the party who requested the report to move for its correction by adding thereto the statement that it contains all the material evidence. *Ibid*.

Procedure in such a case. *Ibid*.

Amendment of record of clerk. *Farris v. St. Paul's Baptist Church*, 356.

Nonsuit.

Action of a judge of the Superior Court in ordering a plaintiff nonsuited because he refused to obey an order directing him to file specifications was held to have been a proper exercise of discretion. *Nickerson v. Glines*, 333.

The proper way to bring before this court the question, whether an order of a judge of the Superior Court nonsuiting a plaintiff for failure to obey a

previous order directing him to file specifications to allegations in his declaration, was an abuse of judicial discretion, is by a bill of exceptions and not by an appeal. *Nickerson v. Glines*, 333.

Auditor's Report.

Where an auditor's report is in evidence before a jury, the finding of a fact by the auditor is evidence of that fact for the jury, whether the auditor was right or wrong in making the finding. *Holbrook v. International Trust Co.* 150.

From an examination of certain findings of an auditor in an action by a trustee in bankruptcy under § 70 e of the bankruptcy act of 1898 to recover the amount of certain payments of money made by a bankrupt firm to the defendant as having been made with the intent to hinder and delay creditors, it was held that the auditor did not find that there was no intent to hinder and delay creditors. *Ibid*.

"Law of the Case."

Where, in an action of tort for personal injuries or for causing death, an exception to a refusal of the presiding judge to order a verdict for the defendant is sustained on the ground that there was no evidence that the person injured or killed was in the exercise of due care at the time of the accident that caused his injuries or death, the decision of this court is "the law of the case" so far as the evidence then passed upon is concerned, and at a new trial of the case the plaintiff, in order to have a right to go to the jury, must present evidence which differs in substance from that produced at the former trial, and which, if then produced, would have made necessary a different decision by this court. *Taylor v. Pierce Brothers, Ltd.* 254.

Interrogatories.

See INTERROGATORIES.

Rules of Court.

Rule 64 of the Superior Court. *Farris v. St. Paul's Baptist Church*, 356.

Rule 2 of the Supreme Judicial Court. *Rubenstein v. Lottow*, 156.

Conduct of Trial.

Order of evidence.

Where, at the trial of an action of tort for damages resulting from a break in a dam, it is a part of the plaintiff's case to prove that the title to the dam is in the defendant, it is within the discretion of the trial judge to refuse to permit the plaintiff to introduce in rebuttal evidence which tends merely to support that part of his case in chief and has no tendency to explain or control any evidence offered by the defendant. *Briggs v. Adams*, 262.

Requests, rulings and instructions.

It was held that there was no error in an instruction of the jury by the presiding judge at the trial of an action for personal injuries in relation to the defendant's duty in the maintenance and operation of an elevator, that, "due care to be exercised by anybody must be commensurate care. It must be the care which is equal and proportionate to the probable harmful

Practice, Civil (*continued*).

consequences that may follow from the lack of its exercise." *Ogden v. Aspinwall*, 100.

A request for a ruling, that, "To look when looking is of no avail and to listen for nothing in particular is equivalent to not looking or listening at all, and if this is all that the plaintiff's driver did, the plaintiff is not entitled to damages and your verdict must be for the defendant," properly may be refused at the trial of an action against a street railway company for personal injuries caused by a collision of a street railway car and a milk wagon. *Manley v. Bay State Street Railway*, 124.

In determining whether a judge, by whom a case was heard without a jury, was right in refusing to rule that "on all the evidence the plaintiff" was "not entitled to recover, and judgment must be for the defendant," no question of pleading is open. *Ideal Leather Goods Co. v. Eastern Steamship Corp.* 133.

It is improper at the hearing of a motion for a new trial for the first time to raise by a request for a ruling a question of law that might have been raised at the trial of the case. *Ramsay v. Le Bow*, 227.

If at a trial the defendant's counsel thinks that the judge has failed to place on a certain instruction the emphasis which it deserves, he should direct the attention of the judge and the plaintiff to such lack of emphasis, and, if he does not do so, he has no grievance. *Doyle v. Singer Sewing Machine Co.* 327.

Certain secret instructions sent by a judge, who had presided at a trial, from the lobby of the court to the jury in their retiring room in answer to a question in writing from the jury, which were held to constitute a mistrial and to require that a verdict returned by the jury after the communication was received by them should be set aside. *Lewis v. Lewis*, 364.

The giving of such a secret instruction is an error of substance in regard to an essential feature of trial by jury and is not a "matter of pleading or procedure" within the meaning of St. 1913, c. 716. *Ibid.*

The refusal of the presiding judge at the trial of an action of tort for personal injuries to make a ruling which is not applicable to the evidence affords no ground for exception, even when the ruling thus requested is correct as an abstract proposition of law. *Gardner v. Copley-Plaza Operating Co.* 372.

Judge's charge.

It was held that there was no error in an instruction of the jury by the presiding judge at the trial of an action for personal injuries, in relation to the defendant's duty in the maintenance and operation of an elevator, that "due care to be exercised by anybody must be commensurate care. It must be the care which is equal and proportionate to the probable harmful consequences that may follow from the lack of its exercise." *Ogden v. Aspinwall*, 100.

The error committed by the admission in evidence of a letter purporting to have been written on behalf of a petitioner for the assessment of damages caused by the laying out of public path was held not to have been cured by an instruction to the jury not to consider the letter unless they were satisfied of the authority of the writer to bind the bank, where on the evidence the jury would not have been warranted in any event in finding the existence of such authority. *Newburyport Institution for Savings v. Brookline*, 300.

A presiding judge in charging a jury may use illustrations to enable the jury more fully to understand and apply the law governing the case as stated to them by the judge. *Wellington v. Cambridge*, 312.

Certain illustrations thus used at the trial of a petition for the assessment of damages for the taking by a city under statutory authority of a wharf and a portion of a dock and certain easements in the dock belonging to the petitioner to illustrate the nature of the special and peculiar damage alleged to have been sustained by the petitioner, which were held to have been proper. *Ibid.*

A statement in the charge of a presiding judge that "the case will undoubtedly go to the Supreme Court" and a statement that the meaning of a certain special statute "will be ultimately for the Supreme Court," were held under the circumstances not to exceed the discretionary powers of the judge as to the mode in which the attention of the jurors should be directed to the importance of the questions presented. *Ibid.*

A defendant is not entitled, by reason of an exception to a refusal of a request to have a verdict ordered in his favor, to have determined and adjudicated by this court the accuracy and legal effect of certain statements of fact made by the judge in his charge to the jury, alleged by the defendant to be inaccurate, especially where he failed to call the judge's attention to the alleged inaccuracies at the close of the charge. *McLellan v. Fuller*, 494.

It was said that an exception to a charge of a judge to a jury "so far as is inconsistent with the rulings requested" by the excepting party well might be dismissed as too indefinite. *Letchworth v. Boston & Maine Railroad*, 560.

It is settled that no exception to a portion of the charge of a presiding judge will be sustained where the charge as a whole sufficiently states the law applicable to the issues tried between the parties and where the failure of the jury to adopt the view of the excepting party cannot be attributed to any fault of the judge and is not an error of law. *Connors Brothers Co. v. Sullivan*, 600.

Ordering Verdict.

In an action against a railroad corporation for causing the death of a flagman in a freight yard of the defendant, it was held that the defendant had no right to rely, in support of the ordering of a verdict in its favor, on any evidence or inference as to the intestate's knowledge of rules of the defendant nor as to his disobedience of them. *Robichaud v. New York, New Haven, & Hartford Railroad*, 250.

Verdict.

On an exception to the refusal of a judge, who presided at the trial of an action of tort for personal injuries, to set aside a verdict for the plaintiff on the ground that the damages were excessive, the question for this court is whether the judge in denying the motion abused his discretion, and to sustain the exception it is necessary to decide that the judge could not have taken honestly the view taken by him. *Ogden v. Aspinwall*, 100.

New Trial.

It is improper at the hearing of a motion for a new trial for the first time to raise by a request for a ruling a question of law that might have been raised at the trial of the case. *Ramsay v. Le Bow*, 227.

Where, in an action of tort for personal injuries or for causing death, an exception to a refusal of the presiding judge to order a verdict for the defendant is sustained on the ground that there was no evidence that the person injured or killed was in the exercise of due care at the time of the accident that caused his injuries or death, the decision of this court is "the law of the case" so far as the evidence then passed upon is concerned, and at a new trial of the case the plaintiff, in order to have a right to go to the jury, must present evidence which differs in substance from that produced at the former trial, and which, if then produced, would have made necessary a different decision by this court. *Taylor v. Pierce Brothers, Ltd.* 254.

Certain secret instructions sent by a judge, who had presided at a trial, from the lobby of the court to the jury in their retiring room in answer to a question in writing from the jury, which were held to constitute a mistrial and to require that a verdict returned by the jury after the communication was received by them should be set aside. *Lewis v. Lewis*, 364.

The giving of such a secret instruction is an error of substance in regard to an essential feature of trial by jury and is not a "matter of pleading or procedure" within the meaning of St. 1913, c. 716. *Ibid.*

Where in an action of contract, at the trial of which the presiding judge ordered a verdict for the defendant, exceptions alleged by the plaintiff are sustained by this court, and it appears by the bill of exceptions that, under the instructions of the judge and the answers returned by the jury to questions put to them by him, the damages which the plaintiff is entitled to recover have been assessed by the jury, there is no occasion for a new trial, and under St. 1913, c. 716, § 2, an order will be made for the entry of a judgment for the plaintiff in the sum found by the jury. *Weeks v. Wilhelm-Dexter Co.* 589.

On an exception to the refusal of a judge, who presided at the trial of an action of tort for personal injuries, to set aside a verdict for the plaintiff on the ground that the damages were excessive, the question for this court is whether the judge in denying the motion abused his discretion, and to sustain the exception it is necessary to decide that the judge could not have taken honestly the view taken by him. *Ogden v. Aspinwall*, 100.

Amendment of Record of Clerk.

If, while a judge of the Superior Court has the allowance of a bill of exceptions under consideration, the clerk of court, without any preliminary warning notice to the parties and erroneously thinking that he was acting under Rule 64, enters a judgment on which execution is issued, upon a motion of the excepting party an order will be made that the record shall be amended by striking out all matters relating to the judgment and the issuing of execution, such entries having been made by the clerk without authority. *Farris v. St. Paul's Baptist Church*, 358.

A court of record has ample power to correct mistakes in its records by ordering the striking out of entries made by the clerk of the court without authority. *Ibid.*

Discharge of Record by Full Court for Amendment.

Statement by RUGG, C. J., of the practice of this court in regard to the discharge of exceptions, reports, reservations or appeals from the Superior

Court or the Supreme Judicial Court for the purpose of correcting the record by amendment. *Burbank v. Farnham*, 514.
Such discharge of an appeal from a decision of the Appellate Division of the Municipal Court of the City of Boston. *Ibid*.

Exceptions.

Presentation and allowance.

Rule 64 of the Superior Court has no application where a bill of exceptions was presented to the judge and a hearing was had thereon within the time allowed by an order of extension, although the excepting party failed to file an amended bill within a time orally agreed upon with the judge at the hearing which was after the day named in the order of extension, because the judge must be considered to have the allowance of the bill still under consideration. *Farris v. St. Paul's Baptist Church*, 356.

Whether exception was saved.

If at a trial the defendant's counsel thinks that the judge has failed to place on a certain instruction the emphasis which it deserves, he should direct the attention of the judge and the plaintiff to such lack of emphasis, and, if he does not do so, he has no grievance. *Doyle v. Singer Sewing Machine Co.* 327.

Statements in a bill of exceptions that the excepting party "objected" to the refusal of the presiding judge to make certain rulings and that such party "objected" to certain portions of the judge's charge, do not state exceptions. *Ogden v. Aspinwall*, 100.

Subjects of exceptions.

The proper way to bring before this court the question, whether an order of a judge of the Superior Court nonsuiting a plaintiff for failure to obey a previous order directing him to file specifications to allegations in his declaration, was an abuse of judicial discretion, is by a bill of exceptions and not by an appeal. *Nickerson v. Glines*, 333.

The ordering of particulars and specifications as to allegations in pleadings rests in the judicial discretion of the trial court and is not subject to review by this court unless there appears to have been an abuse of discretion. *Ibid*.

A finding of fact by a judge as a basis of an order that the plaintiff shall file specifications as to certain allegations in his declaration cannot be reviewed on exceptions where it appears that the finding was made in part in reliance upon statements of counsel which are not reported. *Ibid*.

The refusal of the presiding judge at the trial of an action of tort for personal injuries to make a ruling which is not applicable to the evidence affords no ground for exception, even when the ruling thus requested is correct as an abstract proposition of law. *Gardner v. Copley-Plaza Operating Co.* 372.

Construction of bill.

Statements in a bill of exceptions that the excepting party "objected" to the refusal of the presiding judge to make certain rulings and that such party "objected" to certain portions of the judge's charge, do not state exceptions. *Ogden v. Aspinwall*, 100.

It was said that an exception to a charge of a judge to a jury "so far as is

Practice, Civil (*continued*).

inconsistent with the rulings requested" by the excepting party well might be dismissed as too indefinite. *Leitchworth v. Boston & Maine Railroad*, 560.

What questions are open.

On an exception to the refusal of a judge, who presided at the trial of an action of tort for personal injuries, to set aside a verdict for the plaintiff on the ground that the damages were excessive, the question for this court is whether the judge in denying the motion abused his discretion, and to sustain the exception it is necessary to decide that the judge could not have taken honestly the view taken by him. *Ogden v. Aspinwall*, 100.

In determining whether a judge, by whom a case was heard without a jury, was right in refusing to rule that "on all the evidence the plaintiff" was "not entitled to recover, and judgment must be for the defendant," no question of pleading is open. *Ideal Leather Goods Co. v. Eastern Steamship Corp.* 133.

A defendant, in arguing that the plaintiff should not have been allowed to go to the jury, is not entitled to rely on any evidence which the defendant himself introduced. *Cohen v. Henry Siegel Co.* 215.

In an action against a railroad corporation for causing the death of a flagman in a freight yard of the defendant, it was held that the defendant had no right to rely, in support of the ordering of a verdict in its favor, on any evidence or inference as to the intestate's knowledge of rules of the defendant nor as to his disobedience of them. *Robichaud v. New York, New Haven, & Hartford Railroad*, 250.

Testimony stricken out by order of the presiding judge at a trial cannot be considered by this court in behalf of the plaintiff upon an exception of the plaintiff to the ordering of a verdict for the defendant, if the plaintiff did not except to the order striking out the testimony, even if the testimony stricken out may have been competent. *Stangy v. Boston Elevated Railway*, 414.

A defendant is not entitled, by reason of an exception to a refusal of a request to have a verdict ordered in his favor, to have determined and adjudicated by this court the accuracy and legal effect of certain statements of fact made by the judge in his charge to the jury, alleged by the defendant to be inaccurate, especially where he failed to call the judge's attention to the alleged inaccuracies at the close of the charge. *McLellan v. Fuller*, 494.

Whether excepting party was harmed.

The defendant in an action against a street railway company for personal injuries was held not to have been harmed by certain questions asked of its claims inspector on cross-examination because of the nature of the witness's answers. *Manley v. Bay State Street Railway*, 124.

The error committed by the admission in evidence of a letter purporting to have been written on behalf of a petitioner for the assessment of damages caused by the laying out of a public path was held not to have been cured by an instruction to the jury not to consider the letter unless they were satisfied of the authority of the writer to bind the bank, where on the evidence the jury would not have been warranted in any event in finding the existence of such authority. *Newburyport Institution for Savings v. Brookline*, 300.

At the trial of an action of tort for personal injuries, where the presiding judge at first refused to instruct the jury, as requested by the defendant,

that there was no evidence that the bridge of the plaintiff's nose was broken, and said that, although he did not remember that any doctor had testified that there was such a fracture, he would leave it to the recollection of the jury as to whether there was such evidence, and where afterwards, upon an exception being taken to this refusal, the judge said that he would give the instruction to the jury and gave it in the form requested, the defendant has no ground for exception, the judge having corrected any error he may have made in his earlier refusal to give the instruction. *Doyle v. Singer Sewing Machine Co.* 327.

An interpretation by a trial judge of the language of a receipted bill which was not material to any issue in the case, whether right or wrong, was held to have been harmless. *Tornroos v. R. H. White Co.* 336.

An error, at the trial of an action against an attorney at law for alleged negligence in conducting the trial of an action by the plaintiff against the plaintiff's employer, in the exclusion of a deposition of a witness offered by the defendant is prejudicial if it appears that the testimony given by the witness in the deposition materially and substantially differs from that given by him at the trial of the previous action and, if believed, would show that in that action justice would have been done only if, irrespective of the way in which the attorney conducted the plaintiff's case, a verdict had been found for the plaintiff's employer, who was the defendant in that case. *McLellan v. Fuller*, 494.

An exception to a statement by a medical expert for the plaintiff at the trial of an action of tort for personal injuries, that one of his assistants had applied a certain physical test to the plaintiff, will not be sustained, although the evidence was immaterial, if later in the trial the defendant introduced the result of the test, because the defendant was not harmed by the error. *Letchworth v. Boston & Maine Railroad*, 560.

It is settled that no exception to a portion of the charge of a presiding judge will be sustained where the charge as a whole sufficiently states the law applicable to the issues tried between the parties and where the failure of the jury to adopt the view of the excepting party cannot be attributed to any fault of the judge and is not an error of law. *Connors Brothers Co. v. Sullivan*, 600.

Effect of decision at future trials.

Where, in an action of tort for personal injuries or for causing death, an exception to a refusal of the presiding judge to order a verdict for the defendant is sustained on the ground that there was no evidence that the person injured or killed was in the exercise of due care at the time of the accident that caused his injuries or death, the decision of this court is "the law of the case" so far as the evidence then passed upon is concerned, and at a new trial of the case the plaintiff, in order to have a right to go to the jury, must present evidence which differs in substance from that produced at the former trial, and which, if then produced, would have made necessary a different decision by this court. *Taylor v. Pierce Brothers, Ltd.* 254.

Appeal.

Whether an appeal, taken by one alleged to be a trustee in an action begun by trustee process before final judgment is entered from an order that the

Practice, Civil (continued).

trustee be defaulted for failure to obey an order of the court directing him further to answer certain interrogatories of the plaintiff, was taken prematurely, was not decided. *MacAusland v. Taylor*, 285.

The proper way to bring before this court the question, whether an order of a judge of the Superior Court nonsuiting a plaintiff for failure to obey a previous order directing him to file specifications to allegations in his declaration, was an abuse of judicial discretion, is by a bill of exceptions and not by an appeal. *Nickerson v. Glines*, 333.

An appeal of a defendant from an order overruling his demurrer to certain counts of a declaration, to which other counts afterwards were added by amendment, is disposed of by an order of the judge presiding at the trial of the case, directing the jury to return a verdict for the defendant on the counts demurred to, thus making the demurrer immaterial. *Thornhill v. Carpenter-Morton Co.* 593.

Procedure Peculiar to Land Court.

See LAND COURT.

Procedure and Practice in Probate Court.

See appropriate subtitles under PROBATE COURT.

Procedure under Workmen's Compensation Act.

See appropriate subtitles under WORKMEN'S COMPENSATION ACT.

PRACTICE, CRIMINAL.

Dismissal of Complaint.

A plea in bar to a complaint for keeping a common nuisance consisting of a tenement resorted to for prostitution during a period named, setting up under R. L. c. 205, § 6, an alleged acquittal upon the same charge, is not sustained by showing that a previous complaint upon a like charge covering a part of the same period was dismissed without a trial. *Commonwealth v. Anderson*, 142.

Instructions to Jury.

Proper instructions by the judge presiding at the trial of a complaint charging the defendant with keeping a common nuisance consisting of a tenement resorted to for prostitution, as to evidence that certain police officers made statements to the defendant which if believed by the jury had a tendency to prove the offence charged and that the defendant denied these statements, and where it could be found that the defendant's denials were false and tended to show a consciousness of guilt. *Commonwealth v. Anderson*, 142.

Exceptions.

In a criminal case a general exception to the admission in evidence of a certain conversation cannot be sustained if a part of the conversation was admissible. *Commonwealth v. Anderson*, 142.

If the defendant wishes to except to the admission of a part of the conversation he must state this to the presiding judge, or, after the conversation

has been admitted in evidence, he can move to have the part of it which is inadmissible stricken out. *Commonwealth v. Anderson*, 142.

An exception to the denial by the judge of a motion to strike out all the testimony relating to the conversation cannot be sustained. *Ibid.*

A statement in a bill of exceptions alleged by a defendant convicted under R. L. c. 100, § 1, on a complaint for keeping intoxicating liquors with intent to sell them unlawfully, that "the case was prosecuted under section forty-nine of chapter one hundred of the Revised Laws as amended by chapter two hundred and one of the Acts of 1912," was held under the circumstances only correct in the sense that a violation of § 49 as amended constituted a part of the evidence and to give the defendant no right to contend that he was convicted of a violation of that statute. *Commonwealth v. Cronan*, 467.

PRESCRIPTION.

The owner of a wharf adjoining a private dock was held to have acquired by prescription the right to have the forward hatches of vessels unloading coal at his wharf overlap the adjoining wharf by more than two thirds of the vessels' length without interfering with any right of the public in navigable waters. *Wellington v. Cambridge*, 312.

PROBATE COURT.

Jurisdiction.

Superseding of a decree of the Probate Court appointing a man and his wife joint guardians of their minor child by a decree of the Superior Court made in a divorce suit between the parents. *DeFerrari v. DeFerrari*, 38.

Administrator's Accounts.

Effect of a decree of the Probate Court, allowing a certain first account of an administrator upon a petition for distribution afterwards filed. *Case v. Clark*, 344.

Petition for Distribution.

Upon a petition by an administrator for distribution, the ascertainment with precision of the exact amounts which already have been paid or advanced to the next of kin on account of their distributive shares is a proper subject for inquiry and adjudication. *Case v. Clark*, 344.

Accordingly it is proper to show that the administrator, after having paid certain sums of money to an adopted son of the intestate in return for his notes, agreed with him that such sums should be treated as advancements, and that, when such sums were treated as advancements to the adopted son, he had received far more than his share of the estate, even if the whole amount remaining in the hands of the administrator were paid to the only other next of kin, the intestate's daughter. *Ibid.*

Such facts appearing, a decree ordering the distribution of all the assets to the daughter is warranted. *Ibid.*

Upon a petition in the Probate Court by an administrator for a decree of distribution, the function of the court is to decide, from an examination of the whole record and upon weighing all competent evidence, the exact

Probate Court (*continued*).

amounts which each distributee should receive in order to make the distribution of the whole estate, including previous advancements, conform to the provisions of law and be just to all the parties in interest. *Case v. Clark*, 344.

A decree of the Probate Court, allowing a certain first account of an administrator, was held not to prevent next of kin from showing, at the hearing of a petition for distribution afterwards filed, that the administrator after the allowance of the account agreed with an adopted son of the intestate that sums which had been paid to him for his notes should be treated as advanced to him on account of his distributive share, such matters not being in any sense *res judicata*. *Ibid*.

Amendment of Petition for Proof of Will.

Under the circumstances, after certain findings of a jury upon an appeal from a decree of the Probate Court allowing a will and after a certain rescript of this court upon exceptions taken to rulings of the single justice at that trial, it was held that a single justice of this court had jurisdiction to hear and to grant a motion to amend the petition for proof of the will by striking out from the instrument offered for probate a signature of the testator between the *in testimonium* and the attestation clauses and that such a motion rightly was allowed by him. *Thompson v. Carruth*, 77.

Decree.

A decree of the Probate Court appointing a man and his wife joint guardians of their minor child is superseded, so far as it relates to the custody of the child, by a decree of the Superior Court, made in a divorce suit brought by the wife more than a year later, awarding to the wife the care and custody of such minor child and ordering the husband to make certain payments for the support of his wife and child. *DeFerrari v. DeFerrari*, 38.

Effect of a decree of the Probate Court, allowing a certain first account of an administrator upon a petition for distribution afterwards filed. *Case v. Clark*, 344.

Appeal.

Under the circumstances, after certain findings of a jury upon an appeal from a decree of the Probate Court allowing a will, and after a certain rescript of this court upon exceptions taken to rulings of the single justice at that trial, it was held that a single justice of this court had jurisdiction to hear and to grant a motion to amend the petition for proof of the will by striking out from the instrument offered for probate a signature of the testator between the *in testimonium* and the attestation clauses and that such a motion rightly was allowed by him. *Thomson v. Carruth*, 77.

A decree of the Probate Court allowing a final account of an executor of a will showing payments by him to a legatee is no bar to a suit in equity by a creditor of the legatee to compel the executor to account to him for the amount of a partial assignment of the legacy of which the executor had notice and to which he assented before he made any payment to the legatee. *Security Bank of New York v. Callahan*, 84.

PROSTITUTION.

Keeping of a common nuisance consisting of a tenement resorted to for prostitution, see HOUSE OF ILL FAME.

PROXIMATE CAUSE.

Where a cook employed upon a lighter had valvular disease of the heart and died because of exertion and excitement incident to the sinking of the vessel and his efforts to rescue his belongings, it was held that it could be found that the injury that caused his death arose out of and in the course of his employment within the meaning of the workmen's compensation act. *Brightman's Case*, 17.

Where an employee of the occupant of a garage was killed by an explosion caused by the ignition, when he opened a furnace door, of vapors of gasoline which an oil company's servant negligently had swept into a pit six weeks before and which was caused to flow from the pit when water was poured into the pit by the occupant of the garage who knew of its presence, it was held that an action might be maintained against the oil company for the conscious suffering and death of such employee. *Leahy v. Standard Oil Co. of New York*, 90.

Where at the trial of such action the judge refuses to rule that, if the negligence of the defendant's employee and of the employee of the plaintiff's intestate were contributory proximate causes of the accident, the plaintiff is entitled to a verdict, and instead leaves it to the jury to determine which of the two was the cause of the accident, exceptions to such rulings must be sustained. *Ibid.*

In this Commonwealth it long has been settled law that in an action of tort for personal injuries it is not necessary, in order to hold the defendant liable, for the plaintiff to prove that the particular series of events that resulted in the plaintiff's injuries were the probable consequences of the defendant's negligence. *Ogden v. Aspinwall*, 100.

It is enough for the plaintiff in such an action to show that the probable consequence of the defendant's conduct was that harm of the same general character as that which came to the plaintiff would come to persons who stood in the same general relation to the defendant that the plaintiff did. *Ibid.*

Under the workmen's compensation act findings by an arbitration committee that, although an employee had recovered completely from an injury so far as his eye itself was concerned, "the injury to the eye caused a nervous upset and a neurotic condition which is purely functional," and findings by the Industrial Accident Board that the employee was "partially incapacitated for work by reason of a condition of hysterical blindness and neurosis, said condition having a causal relation with the personal injury," were held to be warranted by the evidence. *Hunnewell's Case*, 351.

Damage to goods in a certain warehouse from an extraordinarily high tide was held to be caused by negligence of the warehouseman and not by an act of God. *Hecht v. Boston Wharf Co.* 397.

Upon evidence which warranted findings that a workman was killed when he jumped from a window of a hospital while mentally deranged because he had been struck in the eye by a splash of molten lead which caused the loss

Proximate Cause.

of his eye, it was held that a finding by the Industrial Accident Board that the death of the employee resulted from the injury to his eye which arose out of and in the course of his employment was warranted. *Sponatski's Case*, 526.

The rule of causation established by *Daniels v. New York, New Haven, & Hartford Railroad*, 183 Mass. 393, applies to cases under the workmen's compensation act. *Ibid.*

Upon a claim under the workmen's compensation act of the dependent widow of an employee whose death is alleged to have resulted from an injury arising out of and in the course of his employment, if it appears that the injury to the workman was followed by his death, it is immaterial whether or not the death was the reasonable and likely consequence of the injury. *Ibid.*

The only question in such case is whether the death was the result of the injury within the meaning of St. 1911, c. 751, Part II, § 6, which provides for compensation to be paid to dependents "if death results from the injury." *Ibid.*

It was held that, upon the evidence, a finding was warranted that the injury that caused the death of a workman who, while engaged in heavy lifting when already subject to an affection of the valves of the heart, suddenly fell to the ground and died of heart disease after about five minutes of unconsciousness, arose out of and in the course of his employment. *Fisher's Case*, 581.

QUO WARRANTO.

Action of the mayor and aldermen of a city, in issuing a permit for the transportation of spirituous and intoxicating liquors into or in such city, if such permit is in proper form, cannot be reviewed in quo warranto proceedings brought by the Attorney General against the person, firm or corporation who received the permit, although such person, firm or corporation is not "regularly and lawfully conducting a general express business" according to the requirement of St. 1906, c. 421, § 2; St. 1911, c. 423. *Attorney General v. Lyons*, 536.

RAILROAD.

In an action against a foreign railroad corporation, which was an interstate carrier, an attempted attachment by trustee process of freight cars that were the property of the defendant in the possession of a Massachusetts railroad corporation was held to be ineffectual because of the nature of the arrangement between the two corporations as to the cars. *Koontz v. Baltimore & Ohio Railroad*, 285.

It also was held that it was unnecessary to determine whether the attachment was invalid by reason of a failure of the plaintiff to comply with the provisions of R. L. c. 167, § 39, relating to the attachment of railroad cars in use in making regular passages. *Ibid.*

If the proprietor of coal sheds constructs a spur track on the land of a railroad corporation connecting the main tracks of the railroad with the sheds, and the railroad corporation agrees with such proprietor that in transporting coal for him it will deliver the coal at his sheds, the transportation does not come to an end until the cars are placed on the spur track adjoining the sheds and, until this has been done, in the absence of a special stipula-

tion, no action can be maintained for the freight money, because the contract of transportation has not been performed. *New York, New Haven, & Hartford Railroad v. Porter*, 547.

A narrowing by a railroad company of a public highway two rods in width by the construction and maintenance of a fence twelve feet within one of its side lines at a point where the railroad passes under the way may be found to constitute an obstruction of the way, the existence of which it was exclusively within the province of the county commissioners to determine in proceedings under R. L. c. 111, § 132. *New York Central & Hudson River Railroad v. County Commissioners*, 569.

Upon the evidence before county commissioners on a petition of the selectmen of a town under R. L. c. 111, § 132, seeking an order that an alleged obstruction of a public way at a point where a railroad passed beneath it be stopped, and upon the findings of the commissioners, it was held that a determination by them that a fence constructed by the railroad company in 1882 twelve feet within the westerly boundary of the way was an obstruction of the way was not contrary to the provision of R. L. c. 53, § 1, disclosed no error of law and was conclusive. *Ibid*.

Order of the county commissioners upon such a petition, which was held to be an order for "repairs" under R. L. c. 111, § 132, and not an order for an "alteration" under § 134. *Ibid*.

A statute, which should prohibit, under a heavy penalty, a railroad corporation from discharging or disciplining an employee in consequence of information relating to the employee's conduct until such employee shall have been given an opportunity to make a statement in the presence of the person or persons furnishing the information, would be unconstitutional. *Opinion of the Justices*, 627.

Actions against railroad corporations for personal injuries, see NEGLIGENCE, Railroad.

REAL ESTATE.

If a city unlawfully enters upon land and constructs a water conduit beneath the surface, the conduit becomes a part of the real estate and the property of the owner of the land. *Perley v. Cambridge*, 507.

RELEASE.

Payment by the guarantor of a balance alleged to be due in an erroneous statement of the balance due rendered by the creditor of the principal debtor was held under the circumstances to have effected neither a release nor a discharge of the principal debt nor any accord and satisfaction. *Barber Asphalt Paving Co. v. Mullen*, 308.

RELIGIOUS SOCIETY.

Where property is held by trustees "for the use of the members of the Methodist Episcopal Church in the United States of America according to the rules and discipline which from time to time may be agreed upon and adopted," and where the discipline of the church provides that questions relating to the election of such trustees shall be determined within the church by appeal to the appropriate conference, resort cannot be had to

the courts to determine by a suit in equity or otherwise the validity of the election of such trustees until the usual methods of relief within the organization have been tried and found wanting. *Crawford v. Nies*, 61.

Signing of a promissory note, given in the name and behalf of an incorporated religious society to the pastor of the society for back salary, by a majority of the board of deacons, in addition to the signatures of the society's treasurer and clerk, was held under the circumstances to be sufficient to bind the society, and signatures of three subdeacons were held to be immaterial and to have no effect to diminish the binding force of the execution of the note by a majority of the deacons. *Farris v. St. Paul's Baptist Church*, 356.

REMOVAL OF SUITS.

On the filing of a petition and a proper bond under the Judicial Code, U. S. St. 1911, c. 231, §§ 28, 29, for the removal of an action of tort from the Superior Court to the District Court of the United States, the provision of § 29, that "It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit," must be obeyed, although the petition contains no allegation that "written notice of said petition and bond for removal" were "given the adverse party or parties prior to filing the same" as required by the statute. *Booki v. Pullman Co.* 71.

The want of such notice is a matter of defence to the petition for removal, which can be asserted or waived upon a motion in the United States District Court to remand the case to the State court. *Ibid.*

RES IPSA LOQUITUR.

See that subtitle under NEGLIGENCE.

RES JUDICATA.

In an action of tort for an assault and battery, the record of a suit in equity, brought by the plaintiff against the defendant immediately after the assault in question in which the trial judge found that "the defendant's servants unjustifiably assaulted the plaintiff" by committing the assault in question, was held to be admissible in evidence and conclusively to establish the fact that an unjustifiable assault was committed upon the plaintiff by a person who at that time was the servant of the defendant. *Coughlin v. Rosen*, 220.

Effect, at a new trial of a case, of a decision of this court sustaining exceptions of a defendant to a refusal of the trial judge to order a verdict in his favor at the first trial. *Taylor v. Pierce Brothers, Ltd.* 254.

A decree of the Probate Court, allowing a certain first account of an administrator, was held not to prevent next of kin from showing, at the hearing of a petition for distribution afterwards filed, that the administrator after the allowance of the account agreed with an adopted son of the intestate that sums which had been paid to him for his notes should be treated as advanced to him on account of his distributive share, such matters not being in any sense *res judicata*. *Case v. Clark*, 344.

Whether all the parties in a suit by a trustee under a will for instructions were represented in a suit by a former trustee under the same will for instructions upon the same questions in such a way that the decision and decree in the former suit made *res judicata* the issues raised in the present suit, was not determined, this court preferring to rest its decision in the present suit upon the soundness in principle of the former decision. *Sherburne v. Little*, 385.

RESTRAINT OF TRADE.

Certain agreements among ice dealers in a certain territory which were held not to be a restraint of competition nor prevention of any person from the free pursuit of the lawful business of gathering, storing, selling or delivering ice in that territory. *Commonwealth v. North Shore Ice Delivery Co.* 55.

Explanation of St. 1908, c. 454. *Ibid.*

Trading stamps and trading stamp books, into which the stamps are to be pasted for the purpose of presenting the books for redemption by the corporation that issues them, are "articles" within the meaning of St. 1908, c. 454, § 1, which prohibits "a monopoly in the manufacture, production or sale in this Commonwealth of any article or commodity in common use." *Merchants Legal Stamp Co. v. Murphy*, 281.

A court of equity, because of the monopoly sought to be established contrary to the provisions of St. 1908, c. 454, § 1, refused to enforce the restriction contained in certain contracts between a corporation issuing trading stamps and books and the merchants of a city and its vicinity by which the merchants agreed not to use trading stamps issued by any other corporation or individual and not to sell the books or stamps to any one. *Ibid.*

A corporation, which has issued trading stamps under contracts containing restrictions illegal and void under St. 1908, c. 454, § 1, cannot maintain a suit in equity to restrain a person, who with knowledge of the terms of such contracts bought the plaintiff's trading stamps from customers of the plaintiff, from buying and disposing of such stamps, where the defendant is not shown to have engaged in any fraud, deception or unfair competition. *Merchants Legal Stamp Co. v. Scott*, 389.

Whether such corporation can be compelled to redeem such trading stamps that have been acquired in violation of the unenforceable terms of its contracts, here was referred to as a question that was not before the court. *Ibid.*

RESTRICTION, EQUITABLE.

See EQUITABLE RESTRICTION.

REVIEW, WRIT OF.

Where the counsel for a bankrupt, after having appeared to defend an action of contract against the bankrupt, withdrew from the case without the defendant's knowledge and did not set up the defence of the defendant's discharge in bankruptcy, by reason of which the defendant without his knowledge was defaulted and afterwards was arrested on execution, whether the bankrupt, upon discovering what had happened in the case, could have had the judgment against him vacated upon a petition for review under

Review, Writ of (continued).

R. L. c. 193, §§ 22-37, and then could have pleaded his discharge in bankruptcy, here was referred to as a question that was not passed upon. *Herschman v. Justices of the Municipal Court of the City of Boston*, 137.

RULES OF COURT.

Equity Rule 37. *Rubenstein v. Lottow*, 156.

Rule 2 of the Supreme Judicial Court. *Ibid.*

Rule 64 of the Superior Court. *Farris v. St. Paul's Baptist Church*, 356.

SALE.

What constitutes.

If the lawful possessor of a dog with the consent of its owner delivers it into the possession of its former owner and no more appears, it cannot be inferred that the purpose of this delivery was to revest the title in the former owner by way of gift, sale or otherwise, and such delivery creates at the highest a gratuitous bailment revocable at the pleasure of the bailor without demand or notice. *Herries v. Bell*, 243.

Construction of Purchase Order.

Position of the words "if desired" in a purchase order were held to render its meaning so doubtful as to permit the introduction of extrinsic evidence for its construction. *Waldstein v. Dooskin*, 232.

Validity.

In an action for a balance alleged to be due upon the purchase price of certain books, it was held to be no defence that the plaintiff in publishing the books had infringed upon the copyright held by another publisher, because it appeared that the defendant had not been disturbed in his possession of the books and that, after the sale of the books to the defendant, the owner of the infringed copyright had brought a suit for such infringement against the publisher in a United States court which was settled by agreement and stipulation. *Edward Thompson Co. v. Pakulski*, 96.

Of Good Will.

Right of an awning maker, who had formed a corporation with a name which consisted of his own name with the word "Company" added, to which he had transferred his business including the good will, to resume business under his own name after the corporation had passed into the hands of a receiver and to compel a new corporation, which had been formed by purchasers from the receiver of all the former corporation's assets including its "business, good will and trade names," to refrain from the use of his name. *C. H. Batchelder & Co. Inc. v. Batchelder*, 42.

SAVINGS BANK.

Where a suit in equity is brought in the Superior Court to establish the beneficial ownership of a plaintiff in certain savings bank deposits which stood

in the name of one deceased as trustee, and the Probate Court has authorized a special administrator to appear and defend the suit, the Superior Court, on finding that the deposits are the property of the plaintiff, has authority to enter a decree ordering the special administrator to deliver the savings bank books to the plaintiff and ordering the banks thereupon to pay to the plaintiff the amounts of the deposits. *Meagher v. Kimball*, 32.

The president of a savings bank has no authority merely by virtue of his office to delegate power to another to write a letter to a town containing offers or admissions as to the value of the bank's interest in a certain path in a town. *Newburyport Institution for Savings v. Brookline*, 300.

The admission in evidence, at the trial of a petition by a banking corporation against a town for the assessment of damages due to the taking of one half of a path for a public footpath, of a certain letter, written to the chairman of the selectmen of the town before the taking with regard to the town assuming care of the path, was held to have been erroneous, because there was no evidence of authority of its writer to bind the bank. *Ibid.*

Excise on savings departments of trust companies. *Old Colony Trust Co. v. Commonwealth*, 409.

SET-OFF.

Equitable set-off, see that subtitle under EQUITY JURISDICTION.

SLANDER.

See LIBEL AND SLANDER.

SPENDTHRIFT TRUST.

See appropriate subtitle under TRUST.

STARE DECISIS.

It was held that, under the circumstances, a decision of this court rendered about twenty-eight years ago in a suit in equity by the trustee under a certain will for instructions should not be reversed nor modified in another suit in equity by a succeeding trustee under the same will for instructions as to the meaning of the same clause. *Sherburne v. Littel*, 385.

STATUTE.

Collection by Rugg, C. J., of cases in which statutes have been held to apply only to causes of action subsequent to their taking effect. *Hanscom v. Malden & Melrose Gas Light Co.* 1.

It is only statutes relating to remedies and not affecting substantive rights that commonly are treated as operating retroactively. *Ibid.*

Application of the foregoing in the construction of St. 1913, c. 305, providing that there should be no dissolution by the death of a debtor of an attachment upon property which he has alienated in his lifetime. *Ibid.*

Statute (*continued*).

If the foregoing statute had contained a provision for its application to cases where the attachment and conveyance had been made before the statute took effect, that provision, if not the whole statute, would have been void. *Hanscom v. Malden & Melrose Gas Light Co.* 1.

Where in passing upon the meaning of a statute a fair consideration of the conditions attending its passage indicates clearly that a literal interpretation would defeat the purpose of the statute, the spirit rather than the letter of the statute is to be followed in its construction. *Fickett v. Boston Firemen's Relief Fund*, 319.

Where by a statute a provision of a former statute is made applicable to a new subject of legislation not contemplated when the earlier statute was passed, such an interpretation of the application must be adopted as will work out practical results. *Old Colony Trust Co. v. Commonwealth*, 409.

Statutes cited and expounded, see page 771.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 771.

STREET RAILWAY.

Actions against street railway companies for personal injuries and death, see NEGLIGENCE, *Street Railway*.

SUBWAYS AND TUNNELS.

The public easement of travel in city streets, the fee in which is owned by the owners of the adjacent land, permits the construction by the public authorities of subways and tunnels for public travel beneath the surface of the street without the giving of compensation to the landowners beyond that which was given when the street originally was laid out. *Peabody v. Boston*, 376.

The exercise of such right a long time after the original laying out of the street infringes no constitutional right of the landowner. *Ibid*.

Therefore, even a long time after the street originally was laid out, the public, without paying to the landowner any compensation beyond what he was paid when the street was laid out, may construct a subway or tunnel beneath the street for the purposes of public travel although thereby the owner is deprived of all use of the land. *Ibid*.

Application of the foregoing principles to the construction of Washington Street tunnel in Boston. *Ibid*.

SUPERIOR COURT.

Jurisdiction and power of the Superior Court as to the separation and separate maintenance of the parties to a libel for divorce, where it is determined that the divorce should not be granted, and as to the guardianship and custody of their minor children. *DeFerrari v. DeFerrari*, 38.

SUPREME JUDICIAL COURT.

Under the circumstances, after certain findings of a jury upon an appeal from a decree of the Probate Court allowing a will, and after a certain rescript of this court upon exceptions taken to rulings of the single justice at that trial, it was held that a single justice of this court had jurisdiction to hear and to grant a motion to amend the petition for proof of the will by striking out from the instrument offered for probate a signature of the testator between the *in testimonium* and the attestation clauses and that such a motion rightly was allowed by him. *Thomson v. Carruth*, 77.

From a bill of exceptions filed by the plaintiff in a suit in equity it appeared that the rulings of the trial judge were wrong but that, upon a proper application of the law to the facts found by the judge, it was clear that the whole case was before this court and that a decree should be made for the plaintiff, and therefore this court under St. 1913, c. 716, § 3, ordered that such a decree be entered. *O'Brien v. Massachusetts Catholic Order of Foresters*, 79.

Rule 2 of the Supreme Judicial Court for the regulation of practice before the full court requires in a case where several sections of the bankruptcy act of 1898 are drawn in question the printing or writing in the briefs of the portions of the statute to be interpreted or applied. *Rubenstein v. Lottow*, 156.

The requirement of the same rule that "each party shall prepare a printed or written brief on paper of the usual quarto size" is not complied with by the presentation of a supplemental brief written on foolscap paper. *Ibid.*

An opinion of the justices of this court given under c. 3, art. 2 of the Constitution upon the constitutionality of a proposed statute, being purely advisory, is not binding as a precedent. *Woods v. Woburn*, 416.

When the question is presented to this court, whether a rule prescribing the qualifications of applicants for admission to the bar, which was made by the board of bar examiners and was approved by this court under R. L. c. 165, § 40, as amended by St. 1904, c. 355, § 1, is unreasonable and therefore ought not to be enforced, the previous approval of the rule by this court without the benefit of argument raises no presumption in favor of the rule and the question must be considered as if it were presented for the first time. *Bergeron, petitioner*, 472.

Statement by Rugg, C. J., of the practice of this court in regard to the discharge of exceptions, reports, reservations or appeals from the Superior Court or the Supreme Judicial Court for the purpose of correcting the record by amendment. *Burbank v. Farnham*, 514.

Where, on an appeal from a decision of the Appellate Division of the Municipal Court of the City of Boston dismissing a report of a ruling of a single judge of that court, it does not appear by the record whether all the material evidence upon which the findings of the single judge were based is stated

Supreme Judicial Court (continued).

or described, this court will grant a motion that the appeal be dismissed to enable the party who requested the report to move for its correction by adding thereto the statement that it contains all the material evidence. *Burbank v. Farnham*, 514.

Procedure in such a case. *Ibid.*

Entry of judgment for the plaintiff under St. 1913, c. 716, § 2, upon the sustaining of an exception by the plaintiff to a ruling ordering a verdict for the defendant. *Weeks v. Wilhelm-Dexter Co.* 589.

SURETY.

See GUARANTY.

TAX.

Constitutionality of certain Proposed Legislation.

See CONSTITUTIONAL LAW, *Taxation.*

Excise on Savings Departments of Trust Companies.

Under St. 1911, c. 337, relating to the excise imposed on the savings departments of trust companies and St. 1909, c. 490, Part III, §§ 21-23, relating to the taxation of savings banks, the deductions from the deposits in the savings departments of trust companies which are allowed on account of investments in "tax exempt" securities are to be computed *pro rata* between the amount of the deposits of the trust companies which are subject to the excise and the amount of their deposits which are not subject to it. *Old Colony Trust Co. v. Commonwealth*, 409.

For the purpose of making the *pro rata* computation mentioned above, the tax commissioner may obtain the necessary facts by inquiries addressed to the responsible officers of the trust companies, and there is nothing that requires him to base his computation merely on information contained in the sworn returns of the companies made by the proper officers. *Ibid.*

TAX COMMISSIONER.

Proper methods for the tax commissioner to use in obtaining the necessary facts for the computation of the excise upon savings departments of trust companies. *Old Colony Trust Co. v. Commonwealth*, 409.

TIDE.

Damage to goods in a certain warehouse from an extraordinarily high tide was held to be caused by negligence of the warehouseman and not by an act of God. *Hecht v. Boston Wharf Co.* 397.

TOWNS.

See MUNICIPAL CORPORATIONS.

TRADING STAMPS.

Trading stamps and trading stamp books, into which the stamps are to be pasted for the purpose of presenting the books for redemption by the corporation that issues them, are "articles" within the meaning of St. 1908,

c. 454, § 1, which prohibits "a monopoly in the manufacture, production or sale in this Commonwealth of any article or commodity in common use." *Merchants Legal Stamp Co. v. Murphy*, 281.

A court of equity, because of the monopoly sought to be established contrary to the provisions of St. 1908, c. 454, § 1, refused to enforce the restriction contained in certain contracts between a corporation issuing trading stamps and books and the merchants of a city and its vicinity by which the merchants agreed not to use trading stamps issued by any other corporation or individual and not to sell the books or stamps to any one. *Ibid.*

A corporation, which has issued trading stamps under contracts containing restrictions illegal and void under St. 1908, c. 454, § 1, cannot maintain a suit in equity to restrain a person, who with knowledge of the terms of such contracts bought the plaintiff's trading stamps from customers of the plaintiff, from buying and disposing of such stamps, where the defendant is not shown to have engaged in any fraud, deception or unfair competition. *Merchants Legal Stamp Co. v. Scott*, 389.

Whether such corporation can be compelled to redeem such trading stamps that have been acquired in violation of the unenforceable terms of its contracts, here was referred to as a question that was not before the court. *Ibid.*

TRESPASS.

If a city unlawfully enters upon land and constructs a water conduit beneath the surface, the conduit becomes a part of the real estate and the property of the owner of the land. *Perley v. Cambridge*, 507.

Effect, at the trial of a petition against a city for the assessment by a jury of damages sustained by the taking of an easement in land of the petitioner for the construction and maintenance of a water conduit, of the fact that, previous to the taking, the city as a trespasser had entered upon the petitioner's land and had constructed the conduit. *Ibid.*

TRUST.

Construction.

Trustee under a certain trust deed from a wife, who under R. L. c. 153, § 33, had obtained a decree that she had been deserted by her husband and was living apart from him for justifiable cause, was held to have a freehold estate in the property sufficient to maintain a writ of entry against the husband. *Mackernan v. Fox*, 197.

And it was held that certain powers of revocation and appointment in the deed, if valid against the creditors of the grantor and against her husband in case he survived her, which here was not open to consideration, did not affect the present legal title of the trustee. *Ibid.*

Where an absolute estate is given in trust by a paragraph of a will in clear and unmistakable language, it cannot be cut down to a less estate by subsequent words in the same paragraph inconsistent therewith. Such subsequent words are treated as of no effect. *Sherburne v. Littel*, 385.

It was held that, under the circumstances, a decision of this court rendered about twenty-eight years ago in a suit in equity by the trustee under a certain will for instructions should not be reversed nor modified in another

Trust (continued).

suit in equity by a succeeding trustee under the same will for instructions as to the meaning of the same clause. *Sherburne v. Little*, 385.

The decision in *Sherburne v. Sischo*, 143 Mass. 439, affirmed. *Ibid*.

Upon the construction of provisions of a will establishing a trust for the benefit of the testator's widow and his three daughters, one only of whom was a daughter of the widow, and directing the trustees "upon the death of my wife and of all my said daughters to convey, assign and transfer all my said real and personal property to the legal heirs of my said daughters in equal proportions by right of representation to have and to hold to them their heirs and assigns forever," it was held that the "legal heirs" of the testator's daughters referred to were their respective heirs at the times of their respective deaths, that the words "convey, assign and transfer" did not show an intention of the testator to postpone the vesting of the remainders, that vested when the donees became entitled to possession. *Upham v. Parker*, 454.

Construction of a will creating a trust for the benefit of the testator's two sons and a woman whom he treated as a daughter, from which it was held that the testator had made a clear distinction between the manner of distributing the income of the trust and that of distributing the principal fund on the termination of the trust; that the whole of the income was given to the three persons named and the survivors or survivor of them until the termination of the trust, and accordingly should be divided equally between the two sons of the testator to the exclusion of the child of the *quasi* daughter. *Anderson v. Bean*, 360.

Enforcement of Trust against Special Administrator of Estate of Trustee.

Where a suit in equity is brought in the Superior Court to establish the beneficial ownership of a plaintiff in certain savings bank deposits which stood in the name of one deceased as trustee, and the Probate Court has authorized a special administrator to appear and defend the suit, the Superior Court, on finding that the deposits are the property of the plaintiff, has authority to enter a decree ordering the special administrator to deliver the savings bank books to the plaintiff and ordering the banks thereupon to pay to the plaintiff the amounts of the deposits. *Meagher v. Kimball*, 32.

Termination.

Language of a certain will was construed to mean that, upon the death of the testator's widow, the testator's daughter was entitled to have terminated a trust, the income of which was to be paid to the widow and the daughter for their joint lives. *Ford v. Ford*, 322.

Powers and Duties of Trustee.

A power to sell real estate given to the trustees under a will for the purpose of making a division of the property of the testator does not include a power to mortgage the real estate. *Sanger v. Farnham*, 34.

Conduct of the trustees under a will by which a testator divided the residue of his estate equally between his son and his grandson and directed that, "as soon as practicable after my decease and such division shall have

been made my trustees shall pay to my said son the sum of five thousand dollars in cash or its equivalent," which was held to show no unnecessary delay, and that the payment to the plaintiff of the balance of the \$5,000 in cash had been made "as soon as practicable" after the testator's decease, thus fixing the time from which the five years of continued existence of the trust were to run. *Sanger v. Farnham*, 34.

Trustee under a certain trust deed from a wife, who under R. L. c. 153, § 33, had obtained a decree that she had been deserted by her husband and was living apart from him for justifiable cause, was held to have a freehold estate in the property sufficient to maintain a writ of entry against the husband. *Mackernan v. Fox*, 197.

Charitable Trust.

See CHARITY.

Spendthrift Trust.

The interest of an adopted daughter of a testator under the provisions of a trust created by his will which required that the whole net income of the trust fund should be paid to her quarterly during her life "together with such portion of the principal of said trust fund as shall make the amount to be paid her at least \$3,000 a year during her life, said income to be free from the interference or control of her creditors," is not affected by the adopted daughter being adjudicated a bankrupt. *Boston Safe Deposit & Trust Co. v. Luke*, 484.

Resulting Trust.

In a suit in equity against a woman by the administrator of her husband's estate, which was insolvent, to set aside certain conveyances made by the intestate to the defendant through an intermediary which were alleged to have been fraudulent against his creditors at common law and under St. 13 Eliz. c. 5, it was held that a decree dismissing the bill should be sustained, because findings were warranted that the conveyances in question were made *bona fide* in execution of resulting trusts, and were not made with intent to hinder, delay or defraud creditors. *Hutchins v. Mead*, 348.

TRUST COMPANY.

Construction of St. 1911, c. 337, relating to the excise imposed on the savings departments of trust companies and St. 1909, c. 490, Part III, §§ 21-23, relating to the taxation of savings banks, as to the deductions from the deposits in the savings departments of trust companies which are allowed on account of investments in "tax exempt" securities. *Old Colony Trust Co. v. Commonwealth*, 409.

For the purpose of making a necessary *pro rata* computation under the foregoing statutes, the tax commissioner may obtain the necessary facts by inquiries addressed to the responsible officers of the trust companies, and there is nothing that requires him to base his computation merely on information contained in the sworn returns of the companies made by the proper officers. *Ibid.*

TRUSTEE PROCESS.

Whether an appeal, taken by one alleged to be a trustee in an action begun by trustee process before final judgment is entered from an order that the trustee be defaulted for failure to obey an order of the court directing him further to answer certain interrogatories of the plaintiff, was taken prematurely, was not decided. *MacAusland v. Taylor*, 265.

Although, in an action begun by trustee process, the answers of one summoned as trustee to interrogatories propounded to him by the plaintiff must be accepted as true and cannot be contradicted, and he cannot be subjected through interrogatories to cross-examination, yet the alleged trustee can be required in answer to interrogatories to testify with reasonable minuteness as to the subject under investigation. *Ibid.*

Further interrogation which was permitted after an alleged trustee had admitted that "the entire balance remaining" in his hands and belonging to the principal defendant "was paid over in full to the principal defendant" with the exception of a sum equal to one half of the amount claimed by the plaintiff, which was held back to be paid to him. *Ibid.*

In determining the question whether an alleged trustee in an action begun by trustee process is chargeable under R. L. c. 189, §§ 9-17, where no interrogatories to the trustee have been filed, the answer of the alleged trustee must be taken as true. *Koontz v. Baltimore & Ohio Railroad*, 285.

In an action against a foreign railroad corporation begun by trustee process, if there has been no personal service on the defendant and no direct attachment of property of the defendant, a valid judgment can be entered only against the property attached by trustee process, and, if the alleged trustee is not chargeable, the case must be dismissed. *Ibid.*

In an action against a foreign railroad corporation, which was an interstate carrier, an attempted attachment by trustee process of freight cars that were the property of the defendant in the possession of a Massachusetts railroad corporation was held to be ineffectual because of the nature of the arrangement between the two corporations as to the cars. *Ibid.*

It also was held that it was unnecessary to determine whether the attachment was invalid by reason of a failure of the plaintiff to comply with the provisions of R. L. c. 167, § 39, relating to the attachment of railroad cars in use in making regular passages. *Ibid.*

UNJUST ENRICHMENT.

See that subtitle under EQUITY JURISDICTION.

VARIANCE.

See that subtitle under PLEADING, CIVIL.

VERDICT.

See that subtitle under PRACTICE, CIVIL.

WAIVER.

Certain provision in the by-laws of a fraternal beneficiary corporation limiting the time within which an action upon a death benefit certificate might be brought was held not to have been waived by the corporation or a foreign corporation with which it had attempted to merge. *Ulman v. United Order of the Golden Cross*, 422.

Waiver by a widow of the provisions of her husband's will was held not to have waived her rights to take under the will as the legal heir of her daughter. *Upham v. Parker*, 454.

By proceeding with a hearing before a master of a suit in equity and a cross suit, the defendant in the cross suit waives a demurrer which was included in his answer to the cross bill. *Torrey v. Parker*, 520.

WAREHOUSEMAN.

An act of God, such as will relieve a warehouseman or bailee from liability for damage to or the destruction of goods entrusted to his charge for hire, may be defined as the action of an irresistible physical force not attributable in any degree to the conduct of man and not in reason preventable by human foresight, strength or care. By RUGG, C. J. *Hecht v. Boston Wharf Co.* 397.

It cannot be ruled as matter of law that damage to goods stored in sheds of a warehouseman fronting on tidewater, which was caused by an extraordinarily high tide, was the result of an act of God, if the exercise of the ordinary prudence, foresight, care and skill reasonably to have been expected from a warehouseman in the performance of his duty would have prevented the damage. *Ibid.*

In an action by the owner of certain wool for its damage by salt water in 1909 when stored in the warehouse of the defendant on the water front of Boston at the time of the highest tide that had risen in Boston Harbor for nearly sixty years, it was held that there was evidence for the jury of negligence on the part of the defendant in the performance of its contract as warehouseman or bailee of the wool. *Ibid.*

A wool dealer by storing wool for a number of years in the sheds of a warehouseman on the water front of Boston, without objecting to the level of the floors of the sheds, does not assume the risk of damage to the wool from an unusually high tide, damage from which could be avoided by raising the floor level of the sheds or making them to some degree waterproof. *Ibid.*

A dealer, who stored with a warehouseman certain goods which were damaged by reason of negligence on the part of the warehouseman, in an action at common law against the warehouseman for such damage to the goods cannot recover for damage to a part of the goods which, when they were fully identified by definite marks, were sold by him to a customer before the damage occurred, the bailor having no relation of trust toward the buyer. *Ibid.*

WASHINGTON STREET TUNNEL.

See SUBWAYS AND TUNNELS.

WATERWORKS.

If a city unlawfully enters upon land and constructs a water conduit beneath the surface, the conduit becomes a part of the real estate and the property of the owner of the land. *Perley v. Cambridge*, 507.

Effect, at the trial of a petition against a city for the assessment by a jury of damages sustained by the taking of an easement in land of the petitioner for the construction and maintenance of a water conduit, of the fact that, previous to the taking, the city as a trespasser had entered upon the petitioner's land and had constructed the conduit. *Ibid.*

Where a city by right of eminent domain has taken an easement in private land for the purpose of the construction and maintenance of a water conduit, it has no right to prevent the owner of the land or his successors in title from making any use of the land for the laying of sewer, water or gas pipes, which does not interfere with the use by the city of the easement acquired by the taking. *Ibid.*

Where a city by right of eminent domain takes an easement in land of a private person in another city for the construction and maintenance of a water conduit therein, the second city is not thereby precluded from laying out under the highway act a street over the land in which the easement has been acquired. *Ibid.*

WAY.

Private.

Where the separate owners of two lots of land, with a strip of land ten feet wide owned in common by them lying between the two lots, established by agreement a right of way to be used in common over the whole strip and one of the owners with the consent of the other constructed a way over the whole strip for their common use, a successor in title of the other owner has no right to change the grade of any part of the way. *Draper v. Varnerin*, 67.

Digging away by such co-owner of the land on his side of the strip so as to leave the level of one half of the way a number of feet below the other half, he can be restrained in a suit in equity brought by the other owner from making any further encroachments on the way and can be ordered to restore the way in so far as possible to its original condition. *Ibid.*

The owner of the fee in one half of a passageway in the town of Brookline, which provides a convenient means of communication between a much used street and a populous residential district on a hill and which is subject to an easement of use "for all the purposes for which such passageways now are or at any time hereafter may be commonly used in said town of Brookline," has no right to build a structure over his half of the way nor to construct buildings which will drop snow, ice or water from their roofs upon it. *Newburyport Institution for Savings v. Brookline*, 300.

At the trial of a petition against the town of Brookline for the assessment of damages due to the taking of such one half of a path, evidence was held to be admissible, for the purpose of proving that no greater servitude existed after than before the taking, of all the physical uses made of similar paths in Brookline, irrespective of the provisions of the deeds, instruments or public acts which created them. *Ibid.*

Certain rulings as to what damages can be removed on a petition for the assessment of damages caused by the laying out of a private way as a public highway, and as to what evidence is admissible. *Wooley v. Fall River*, 584.

Public.

The public easement of travel in city streets, the fee in which is owned by the owners of the adjacent land, permits the construction by the public authorities of subways and tunnels for public travel beneath the surface of the street without the giving of compensation to the landowners beyond that which was given when the street originally was laid out. *Peabody v. Boston*, 376.

The exercise of such right a long time after the original laying out of the street infringes no constitutional right of the landowner. *Ibid.*

The owner of land beneath a public street has a right to use such land in any way not inconsistent with the public easement of travel; but, even a long time after the street originally was laid out, the public, without paying to the landowner any compensation beyond what he was paid when the street was laid out, may construct a subway or tunnel beneath the street for the purposes of public travel although thereby the owner is deprived of all use of the land. *Ibid.*

Evidence at the trial of a petition for the registration of the title to certain land, where a question at issue was, whether one side of the land was bounded by the end of a public way, which included records of town meetings in 1852 and conduct of the town as to the way since that time and recitals in deeds of the respondents, was held to warrant a finding that the way was an ancient public way. *Reed v. Mayo*, 565.

Even though, in the records of town meetings in 1852, with reference to action upon a petition for the laying out of a certain town way, there was no record that the laying out with boundaries and measurements had been filed with the town clerk seven days before the meeting as required by Rev. Sts. c. 24, § 69, it was held that it might be presumed or inferred after sixty years, that the statutory requirement was complied with. *Ibid.*

A narrowing by a railroad company of a public highway two rods in width by the construction and maintenance of a fence twelve feet within one of its side lines at a point where the railroad passes under the way may be found to constitute an obstruction of the way, the existence of which it was exclusively within the province of the county commissioners to determine in proceedings under R. L. c. 111, § 132. *New York Central & Hudson River Railroad v. County Commissioners*, 569.

Upon the evidence before county commissioners on a petition of the selectmen of a town under R. L. c. 111, § 132, seeking an order that an alleged obstruction of a public way at a point where a railroad passed beneath it be stopped, and upon the findings of the commissioners, it was held that a determination by them that a fence constructed by the railroad company in 1882 twelve feet within the westerly boundary of the way was an obstruction of the way was not contrary to the provision of R. L. c. 53, § 1, disclosed no error of law and was conclusive. *Ibid.*

Order of the county commissioners upon such a petition, which was held to be an order for "repairs" under R. L. c. 111, § 132, and not an order for

Way (continued).

an "alteration" under § 134. *New York Central & Hudson River Railroad v. County Commissioners*, 569.

Certain rulings as to what damages can be recovered on a petition for the assessment of damages caused by the laying out of a private way as a public highway, and as to what evidence is admissible at the trial of such a petition. *Wooley v. Fall River*, 584.

WIDOW.

Waiver by a widow of the provisions of her husband's will was held not to have waived her rights to take under the will as the legal heir of her daughter. *Upham v. Parker*, 454.

WILL.

Under the circumstances, after certain findings of a jury upon an appeal from a decree of the Probate Court allowing a will and after a certain rescript of this court upon exceptions taken to rulings of the single justice at that trial, it was held that a single justice of this court had jurisdiction to hear and to grant a motion to amend the petition for proof of the will by striking out from the instrument offered for probate a signature of the testator between the *in testimonium* and the attestation clauses and that such a motion rightly was allowed by him. *Thomson v. Carruth*, 77.

Where an absolute estate is given by a paragraph of a will in clear and unmistakable language, it cannot be cut down to a less estate by subsequent words in the same paragraph inconsistent therewith. Such subsequent words are treated as of no effect. *Sherburne v. Little*, 385.

Waiver by a widow of the provisions of her husband's will was held not to have waived her rights to take under the will as the legal heir of her daughter. *Upham v. Parker*, 454.

WITNESS.

Deposition.

Deposition of a witness in an action at law, taken upon oral interrogatories on the ground that the witness was about to go out of the Commonwealth not to return in time for the trial, which under the circumstances was held not to be inadmissible in evidence merely by reason of the fact that the notice that it was to be taken, given by the justice of the peace before whom it was to be taken to the party objecting to its admission, misspelled that party's name. *McLellan v. Fuller*, 494.

Cross-examination.

If, at the trial of an action against a street railway company for personal injuries, one of the defendant's inspectors, who interviewed the plaintiff soon after he received his injuries and who had testified in direct examination by the defendant that the plaintiff at that interview had told him that he did not know who was to blame for the accident, is allowed to be asked in cross-examination, in substance, whether at the time when he took the statement from the plaintiff he knew that, in case of a subsequent trial, the statement would be used as he was using it, and answers, "I hadn't

given it a thought," the defendant, on account of the nature of the answer, cannot have been harmed by the question; and therefore an exception by the defendant to the question and answer will be overruled, irrespective of whether the question was or was not competent, which was not decided. *Manley v. Bay State Street Railway*, 124.

Impeachment.

In an action on certain promissory notes against an indorser, whose defence was that he indorsed the notes without consideration at the request and for the accommodation of the plaintiff, the record of a judgment against the defendant in a certain action which he had brought against the plaintiff on an independent demand, and before bringing which he had claimed the right to set off that demand against his liability on the notes, was held not to be admissible to impeach his credibility, because that judgment settled only the controversy then on trial, and did not affect the present issue either by estoppel or as an admission. *Connors Brothers Co. v. Sullivan*, 600.

WORDS.

- "Alteration." See *New York Central & Hudson River Railroad v. County Commissioners*, 569, 574.
- "Article." See *Merchants Legal Stamp Co. v. Murphy*, 281, 284.
- "Commensurate." See *Ogden v. Aspinwall*, 100, 105.
- "Convey, assign and transfer." See *Upham v. Parker*, 454, 459.
- "Cost." See *Metropolitan Life Ins. Co. v. Insurance Commissioner*, 52, 53.
- "Dealer." See *Commonwealth v. Silverman*, 552, 554, 555.
- "Derailment." See *Graham v. Insurance Co. of North America*, 230, 231.
- "Fire department." See *Fickett v. Boston Firemen's Relief Fund*, 319, 321.
- "Insolvency." See *Holbrook v. International Trust Co.* 150, 154.
- "Legal heirs." See *Upham v. Parker*, 454, 457, 458, 459.
- "Loss." See *Munroe v. Woburn*, 116, 119, 120.
- "Objected." See *Ogden v. Aspinwall*, 100, 102, 103.
- "Person." See *C. H. Batchelder & Co. Inc. v. Batchelder*, 42, 46.
- "Pleading or procedure." See *Lewis v. Lewis*, 364, 370.
- "Practicable." See *Sanger v. Farnham*, 34, 38.
- "Proportional." See *Opinion of the Justices*, 613, 619, 620.
- "Proportional and reasonable." See *Opinion of the Justices*, 613, 618, 619, 622, 625.
- "Repairs." See *New York Central & Hudson River Railroad v. County Commissioners*, 569, 573, 574.
- "Revert." See *Ford v. Ford*, 322, 324.
- "Trouble." See *Munroe v. Woburn*, 116, 120.

WORKMEN'S COMPENSATION ACT.

Jurisdiction of Industrial Accident Board.

Upon the facts before them, it was held that, six months after the end of a period for which they had awarded an employee compensation for total incapacity, the Industrial Accident Board had jurisdiction to make a finding that the employee was "partially incapacitated for work" as the result of

his original injury, and to make an award of weekly compensation under St. 1911, c. 751, Part II, § 10, from a day named which was about four months after the cessation of the payments for his total incapacity for work, to continue so long as his partial incapacity for work should last, which was declared not to be determinable at that time. *Hunnewell's Case*, 351. It also was held that there was no error in making the weekly payments awarded by the board begin two months before the date of the filing of the request for a review, such a retroactive award being within the lawful power of the board. *Ibid*.

Procedure.

Under the provisions of the workmen's compensation act, it is made the duty of the arbitration committee to report all the material evidence, and it therefore is to be assumed in the absence of any statement on the subject in their report to the Industrial Accident Board that this duty has been performed. *Brightman's Case*, 17.

However, in a report of a decision of the Industrial Accident Board, in order to show that all the material evidence before that board was reported, a statement to that effect would be necessary. *Ibid*.

Where, on an appeal by an insurer from a decision of the Industrial Accident Board, it appears that that board heard the case only on the report of the arbitration committee and heard no other evidence, this court, although no statement to that effect appears in the record, will assume that all the evidence is reported and it is open to the insurer to argue that the findings are not warranted upon the evidence reported. *Ibid*.

It here was said by the court, that in the reporting of appeals from decisions of the Industrial Accident Board in future cases it would be desirable to have a clear statement as to whether that board heard the case only upon the report of the arbitration committee or whether in addition to that report evidence was received at the hearing before the board. *Ibid*.

Burden of Proof.

Where under the workmen's compensation act a claim for compensation is made by the dependent widow of an employee whose death is alleged to have resulted from an injury arising out of and in the course of his employment, the burden of proving the essential facts necessary to warrant an award of compensation rests upon the dependent in the same way that the burden of proof rests upon the plaintiff in any proceeding at law. *King's Case*, 290; *Sponatski's Case*, 526.

Persons to whom Act applies.

It seems that under St. 1911, c. 751, Part V, § 2, before it was amended by St. 1914, c. 708, § 13, the employment of a workman for a single day, with no agreement or understanding express or implied extending the service beyond the close of the day's work, was "but casual." *King's Case*, 290.

So that, if such workman was killed in the course of his employment on that day, his dependent widow was not entitled to receive an award for his death under the provisions of the workmen's compensation act. *Ibid*. In proceedings before the Industrial Accident Board, in which the dependent

widow of a deceased employee seeks to obtain compensation for her husband's death under the provisions of the workmen's compensation act, the burden of proof is upon the dependent to satisfy the board that the employee's service was such as to entitle her to compensation for his death. *King's Case*, 290.

Injuries to which Act applies.

Where a cook employed upon a lighter had valvular disease of the heart and died because of exertion and excitement incident to the sinking of the vessel and his efforts to rescue his belongings, it was held that it could be found that the injury that caused his death arose out of and in the course of his employment within the meaning of the workmen's compensation act. *Brightman's Case*, 17.

Upon a claim under the workmen's compensation act of the dependent widow of an employee whose death is alleged to have resulted from an injury arising out of and in the course of his employment if it appears that the injury to the workman was followed by his death, it is immaterial whether or not the death was the reasonable and likely consequence of the injury. *Sponatski's Case*, 526.

The only question in such case is whether the death was the result of the injury within the meaning of St. 1911, c. 751, Part II, § 6, which provides for compensation to be paid to dependents "if death results from the injury." *Ibid*.

Upon evidence which warranted findings that a workman was killed when he jumped from a window in a hospital while suffering from a mental derangement caused by his having been struck in the eye by a splash of molten lead, it was held that a finding by the Industrial Accident Board that the death of the employee resulted from the injury to his eye which arose out of and in the course of his employment was warranted. *Ibid*.

The rule of causation established by *Daniels v. New York, New Haven, & Hartford Railroad*, 183 Mass. 393, applies to cases under the workmen's compensation act. *Ibid*.

It was held that, upon the evidence, a finding was warranted that the injury that caused the death of a workman who, while engaged in heavy lifting when already subject to an affection of the valves of the heart, suddenly fell to the ground and died of heart disease after about five minutes of unconsciousness, arose out of and in the course of his employment. *Fisher's Case*, 581.

Amount of Award.

Under the workmen's compensation act findings by an arbitration committee that, although an employee had recovered completely from an injury so far as his eye itself was concerned, "the injury to the eye caused a nervous upset and a neurotic condition which is purely functional," and findings by the Industrial Accident Board, that the employee was "partially incapacitated for work by reason of a condition of hysterical blindness and neurosis, said condition having a causal relation with the personal injury," were held to be warranted by the evidence. *Hunnewell's Case*, 351.

And it further was held that the Industrial Accident Board properly might make an award to such workman under St. 1911, c. 751, Part II, § 10, on account of partial incapacity for work. *Ibid*.

Upon the facts before them, it was held that, six months after the end of a period for which they had awarded an employee compensation for total incapacity, the Industrial Accident Board had jurisdiction to make a finding that the employee was "partially incapacitated for work" as the result of his original injury, and to make an award of weekly compensation under St. 1911, c. 751, Part II, § 10, from a day named which was about four months after the cessation of the payments for his total incapacity for work, to continue so long as his partial incapacity for work should last, which was declared not to be determinable at that time. *Hunnewell's Case*, 351.

It also was held that there was no error in making the weekly payments awarded by the board begin two months before the date of the filing of the request for a review, such a retroactive award being within the lawful power of the board. *Ibid*.

Appeal.

Construction of a certain appeal record with regard to whether all the evidence before an arbitration committee and the Industrial Accident Board was in the record; and statement of the proper procedure to be followed as to alleging whether all such evidence was reported in the record. *Brightman's Case*, 17.

Where in a record of an appeal under the workmen's compensation act it was stated that at the request of the insurer certain "excerpts from the transcript of the evidence" were attached to the decision of the Industrial Accident Board it was held, that it could not be assumed that these excerpts stated all the material evidence on the questions presented to this court. *King's Case*, 290.

Therefore this court could not say that as matter of law there was no evidence warranting a certain finding of the Industrial Accident Board, although the evidence reported in the excerpts did not warrant the finding. *Ibid*.

On an appeal to this court under the provisions of the workmen's compensation act, where the substance of the evidence is reported, the question is open whether the finding of the Industrial Accident Board was warranted by the evidence. *Sponatski's Case*, 528.

WRIT OF ENTRY.

Trustee under a certain trust deed from a wife, who under R. L. c. 153, § 33, had obtained a decree that she had been deserted by her husband and was living apart from him for justifiable cause, was held to have a freehold estate in the property sufficient to maintain a writ of entry against the husband. *Mackernan v. Foz*, 197.

And it also was held that certain powers of revocation and appointment in the deed, if valid against the creditors of the grantor and against her husband in case he survived her, which here was not open to consideration, did not affect the present legal title of the trustee. *Ibid*.

WRIT OF REVIEW.

See REVIEW, WRIT OF.

WRONGDOER WITHOUT REMEDY.

In a suit in equity by a trustee in bankruptcy to recover the amounts of accounts receivable assigned to the defendant in fraud of the law, the defendant cannot be allowed to contend that, if the assignment to him of the accounts receivable thus is to be set aside as in fraud of the law, he is entitled to recover the sums of money paid by him to the bankrupt when the assignment was made; because where one has committed a fraud upon the law he has no standing in court but is left by the law without a remedy in the position in which he put himself. *Rubenstein v. Lottow*, 156.

A court of equity because of the monopoly sought to be established contrary to the provisions of St. 1908, c. 454, § 1, refused to enforce the restriction contained in certain contracts between a corporation issuing trading stamps and books and the merchants of a city and its vicinity, by which the merchants agreed not to use trading stamps issued by any other corporation or individual and not to sell the books or stamps to any one. *Merchants Legal Stamp Co. v. Murphy*, 281.

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